IN THE

Supreme Court of the United States

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October Term, 1973

No. 73-970

DERICKSEN M. BRINKERHOFF
and the MEMBERS OF THE CLASS,
Petitioners,

v.

AMFAC, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Dericksen M. Brinkerhoff and the members of the class of minority shareholders respectfully pray that a writ of certiorari issue to review the judgment and *per curiam* opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 13, 1973 and the *per curiam* order of the United States Court of Appeals for the Ninth Circuit on petition for rehearing entered on October 19, 1973.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals entered on September 13, 1973, not yet reported, appears in the Appendix hereto at pp. A1-A2. The *per curiam* order of

the Court of Appeals entered on October 19, 1973, not yet reported, appears in the Appendix hereto at p. A3. The opinion rendered by the United States District Court for the District of Hawaii on March 19, 1973, is reported at 59 F.R.D. 116 (D. Haw. 1973) and appears in the Appendix hereto at pp. A4-A24.

JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 1973. A timely petition for rehearing and suggestion of appropriateness of rehearing *en banc* was denied on October 19, 1973, and this petition for writ of certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

After plaintiff-petitioners were granted summary judgment on the issue of liability in this class and derivative action under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), the parties agreed upon and the district court approved a settlement providing for a reappraisal of the value of the stock of three Hawaiian plantation companies by an independent investment banker who, because of the substantial real estate involved, was to be assisted by an independent Hawaiian real estate appraiser. The appraisals were to be performed in accordance with specific, mandatory instructions jointly drafted by the parties. The appraisers disregarded their mandatory instructions, and petitioners never received the appraisals for which they bargained. The questions presented for review are:

1. In administering a settlement of an action under the federal securities laws providing for reappraisals of stock value pursuant to mandatory instructions jointly drafted by the parties, may the federal courts accept and

are the parties bound by appraisals which were not performed in accordance with the instructions?

2. Were petitioners denied their right to a hearing on their motion to set aside the appraisals for actual or constructive fraud by the district court's refusal to allow petitioners the opportunity to examine the only persons through whom actual or constructive fraud could be proved, the executive officers of the principal defendant, or to introduce into evidence the documents of the principal defendant which would substantiate petitioners' charges?

STATEMENT OF THE CASE

A. Introduction

This petition seeks review of decisions which discourage settlement of class action securities litigation in the efficient and economical manner achieved herein, undermine and thwart the remedial purposes of the federal securities laws, and result in so grave a miscarriage of justice as to cry out for this Court's review. The decisions below would permit a party *found guilty of federal securities law fraud* to retain the *multimillion dollar* bounty of its fraud by virtue of the lower courts' failure to enforce a settlement agreement and mandatory instructions to appraisers in accordance with the undisputed understanding and intent of the parties.

B. History of the Proceedings

This class and derivative action to enforce the federal securities laws arose out of the mergers of three sugar plantation companies, The Lihue Plantation Co., Ltd. ("Lihue"), Puna Sugar Co., Ltd. ("Puna") and Kekaha Sugar Co., Ltd. ("Kekaha") (hereinafter collectively referred to as the "Plantations"), into the principal defendant and respondent herein, Amfac, Inc. (hereinafter referred to as "Amfac").

The gravamen of the complaint was that, in violation of Sections 10(b) and 14(a) of the 1934 Act, 15 U.S.C. §78j and §78n, defendants had misrepresented in a joint proxy statement that an independent investigation and review of the exchange ratios had been performed and that the values determined for the Plantations' stock in computing the exchange ratios were fair. The principal damage issue arose out of the allegation that the substantial Hawaiian real estate holdings of the Plantations had been fraudulently undervalued, resulting in grossly unfair and inequitable exchange ratios.

Significantly, Amfac itself admitted in a brief in support of transfer of venue from the Central District of California to the District of Hawaii that the value of the Plantations' real estate was the principal issue in the case:

> "The *ultimate principal issue* in the action below will be the *valuation placed upon the landholdings of the plantation companies.* All of this land is located in Hawaii." (Italics added.)[1]

After extensive discovery, District Judge Tavares granted petitioners' motion for summary judgment against Amfac and other defendants on the issue of liability under Section 10(b) of the 1934 Act.[2]

C. The Settlement Agreement

As a result of arduous and extensive negotiations, and to avoid the necessity for three separate jury trials on the issue of damages, a settlement was agreed upon which provided for the expeditious and economical independent appraisal of the value of the real estate and other assets of the Plantations and concomitant determination of the fair value of the Plantations' stock.

The Stipulation of Settlement provided for court appointment of an independent investment banker to reappraise the value of the capital stock of each of the Plantations *in the precise manner agreed upon by the parties*, as reflected in detailed written instructions *jointly drafted* by the parties and delivered by Judge Tavares. The investment banker was to be instructed to consider *all*

1. This admission appears at page 7 of the brief which Amfac filed in the Ninth Circuit in opposition to a petition for a writ of mandamus from the order transferring this case under 28 U.S.C. § 1404(a) from the Central District of California to the District of Hawaii.

2. Judge Tavares also stated that he would have granted petitioners' motion for summary judgment on the issue of liability under Section 14(a) as well but for the exemption of the Plantations' securities from the proxy solicitation requirements of Section 14(a). (Transcript of Proceedings, May 5, 1971, at pp. 5-6.)

relevant value criteria which expressly were to include, but not be limited to, market price, *net asset value* and investment value. In light of the recognition by the parties that the value of the real estate, all of which was located in Hawaii, was the "ultimate principal issue" of the case, the Stipulation of Settlement further expressly provided that the independent investment banker was to be assisted by an independent Hawaiian real estate appraiser, Gilbert W. Root ("Root"), whose *sole* duty it would be to *value the "substantial real estate holdings"* of the Plantations at the time of the mergers for the investment bankers' use in the consideration of *net asset value*. The investment banker and real estate appraiser were to serve as officers of the court under the court's sole direction and supervision and their determination of the value of the capital stock of each of the Plantations was to be final and binding.[3]

Despite the fact that the net asset value of the Plantations' substantial real estate holdings was the most vital of all issues, the appraisers admittedly disregarded their instructions and failed to make a net asset valuation of ninety-two percent (92%) of the real estate holdings of one plantation and fifty percent (50%) of the real estate of another, and thereby short-changed the minority shareholders by many millions of dollars. Thus, the appraisers demonstrably failed to conduct their assigned duties in accordance with the jointly drafted *mandatory* instructions and petitioners have never received the independent appraisals for which they bargained.

D. The Mandatory Instructions

The instructions,[4] which were *jointly drafted* by the

3. After a hearing pursuant to notice, Judge Tavares approved the settlement, dismissed the action except for the express reservation of jurisdiction for the purpose of implementing, supervising and enforcing the terms of the settlement, and appointed Eastman Dillon, Union Securities & Co. ("Eastman Dillon") as the investment banker and Root as the real estate appraiser to perform the agreed upon appraisals.

4. The instructions to the appraisers appear in the Appendix hereto at pp. A25-A28.

parties pursuant to the Stipulation of Settlement, first emphasized the importance of the Plantations' substantial real estate holdings and then, in recognition of the significance of the value of the real estate, instructed Eastman Dillon that in consideration of net asset value it *must* "utilize the services of Gilbert W. Root, MAI, of Honolulu, Hawaii as *real estate appraiser*," whose *sole duty* it would be to appraise the *value of the Plantations' real estate* (Appendix ["App."], pp. A25-A27):

> "The purpose of this hearing is to appoint Eastman Dillon, Union Securities & Co. and Gilbert W. Root, as officers of this Court, to perform independent appraisals of the value of the capital stock of the Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. (which I shall hereinafter refer to as the 'Plantations') *in accordance with the settlement of this action* and to instruct the Court's appraisers as to the scope of their duties and the **manner** in which they shall perform them."
>
> * * *
>
> "The settlement of this action provides that the value of the common stock of the Plantations shall be reappraised by an independent investment banker who, **in light of the substantial real estate holdings** and leaseholds of the Plantation companies, **shall** be assisted by an independent **real estate** appraiser. . . ."
>
> * * *
>
> ". . . You **shall** consider all relevant value criteria which **shall** include but not necessarily be limited to market price, **net asset value** and investment value. *In the consideration of net asset value*[5] *you* **shall** *utilize the services of Gilbert W. Root, MAI, of Honolulu, Hawaii* **as real estate appraiser** who, under your

5. The vital importance to the parties of the net asset value of the real estate is illustrated, *inter alia*, by its highlighted and individualized treatment in the jointly drafted instructions.

supervision, **shall** appraise the value of such of the *real estate* of each of the three Plantations as directed by you. . . .

"Mr. Root, it is your duty, *as the real estate appraiser, to appraise the value of such of the real estate of each of the three Plantations as directed by Eastman Dillon for Eastman Dillon's use* **in the consideration of net asset value.**[6] Although you are to perform your appraisals under the direction of Eastman Dillon, you are to reach your own independent judgment *as to the value of the real estate appraised* and you are to perform your appraisals in the ordinary, customary and usual manner recognized by your profession." (Italics and boldface added.) (Footnotes added.)

There was no dispute below as to what the parties intended by their instructions:

(1) **Amfac conceded** in its comments on the appraisals that the term "net asset value" as used in both the instructions to the appraisers and the Stipulation of Settlement meant the theoretical liquidation value of the Plantations' assets, as defined in Delaware cases.[7] Thus, Amfac admitted (Record on Appeal ["Rec."], pp. 5802-03):

"Net asset value is defined as a theoretical liquidating value to which the share would be entitled upon liquidation of the company."

* * *

"The area in which courts have devoted the most consideration to the valuation of capital stock concerns

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6. Root was directed by Eastman Dillon to appraise *all* of the real estate of the three Plantations. (Transcript of Proceedings ["Tr."], December 4, 1972, at pp. 25, 26, 36, 140, 200.)

7. See *e.g., Poole v. N. V. Deli Maatschappij*, 243 A.2d 67 (Del. Sup. Ct. 1968); *Swanton v. State Guaranty Corp.*, 215 A.2d 242 (Del. Ch. Ct. 1965).

the appraisal of stock held by dissenting stockholders, and the expertise of the Delaware courts in this field is generally acknowledged."

(2) **Amfac conceded** in its comments on the appraisals that theoretical liquidation value *must be weighed* by the appraisers as one element in the value of the Plantations' stock. As Amfac itself stated (Rec., p. 5804):

> "The facts presented by the valuation of the stock of the Plantations is considerably different from that presented in the *Brown* case, but the principal of law established by the case is clear—**all three valuation methods must be weighed** *in arriving at a determination of the value of the stock.* This method of appraisal is not limited to dissenters rights cases as shown by Poole v. N. V. Deli Maatschappij, 43 Del. Ch. 241, 224 A.2d 260 (1966), which involved a class action on behalf of the minority shareholders of American Sumatra Tobacco Corporation against a controlling corporation for inducing the sale of stock by fraudulent misrepresentation in a tender offer. The Delaware Supreme Court held that *the method of determining the actual value of stock in fraud cases is the same as in evaluation in dissenting stock appraisal proceedings and that in both situations consideration* **must** *be given to investment value, market price and* **asset value."** (Italics and boldface added.)

Thus, all parties were in agreement that Root was *required* to appraise the theoretical liquidation value of the Plantations' substantial real estate holdings, Eastman Dillon was *required* to appraise the theoretical liquidation value of the non-real estate assets and Eastman Dillon was *required* to consider and give some weight to the theoretical liquidation value of *all assets* in fixing the fair value of the Plantations' stock. *This the appraisers admittedly failed to do!*

E. The Appraisals

The reports filed by Eastman Dillon and Root revealed that *Root never appraised the theoretical liquidation value of any of the thousands of acres of real estate employed in the Plantations' sugar operations,*[8] Eastman Dillon never appraised the theoretical liquidation value of any of the other assets employed in sugar operations and, therefore, Eastman Dillon could not and did not include any amount for the liquidation value of said real estate and other assets in its appraisal of the Plantations' stock. Instead, Eastman Dillon valued the assets employed in the sugar operations *solely* on an investment or capitalization of earnings basis. As a result, the appraisers understandably found the value of a share of each Plantations' stock to be worth *less* than the value of the Amfac stock received.[9]

The magnitude of the injustice perpetrated was demonstrated below, *inter alia*, by the appraisers' testimony that lands employed in sugar operations by a sugar plantation adjacent to Lihue were liquidated for as much as $28,000 *per acre* (Tr., December 4, 1972, at pp. 47-49, 317-25) and Lihue's own sugar lands were condemned by or sold to the government for as much as $14,800 *per acre* (*Id.*, pp. 428-

8. In the case of one of the plantations, Lihue, 29,266 acres out of its total of 31,826 acres of land, or approximately 92% of all of its land, were employed in sugar operations. (Tr., December 4, 1972, at p. 30.) In the case of another, Puna, 9,016 acres out of its total of 18,257 acres of land, or nearly 50%, were employed in sugar operations. (Rec., pp. 6361, 6369-71.)

9. It should be noted that petitioners did not contend below and do not now contend that they were entitled to receive the full net asset or liquidation value of the Plantations' assets. Petitioners vigorously assert, however, that under the Stipulation of Settlement and the jointly drafted instructions, Eastman Dillon was required to include the "net asset value," *i.e.* the liquidation value, of *all* of the Plantations' assets, including the real estate and other assets employed in sugar operations, as one of the essential criteria of the value of the Plantations' stock.

32). Even if Lihue's sugar lands had an average liquidation value of only $1,000 per acre, the asset value of Lihue, exclusive of all of the other valuable assets employed in sugar operations, would be over $29,000,000. Shockingly, however, without even knowing the liquidation value of Lihue's sugar lands and other assets, Eastman Dillon valued Lihue's *entire* sugar operation, including but not limited to its 29,266 acres of land, at $5,000,000 calculated *solely* on the basis of a capitalization of Lihue's admittedly distressed earnings, thereby depriving the minority shareholders of any credit for these extraordinarily valuable lands and giving Amfac, who had been found guilty of securities law fraud, a multi-million dollar windfall.[10]

Ironically, although the principal purpose of this lawsuit and the settlement was to obtain fair consideration of the underlying land values, and although Root was appointed for the *sole* purpose of performing a net asset appraisal of the real estate, the net asset value of the thousands of acres of plantation real estate employed in sugar operations was never determined and no amount whatsoever reflecting that value was included in the value of the Plantations' stock.

F. Petitioners' Motion to Set Aside Appraisals

On November 6, 1972, petitioners filed a motion to set aside the appraisals on the grounds: (1) that the appraisers failed to perform in accordance with the mandatory instructions and the settlement agreement and (2) the appraisals were tainted by actual or constructive fraud. On November 24, 1972, District Judge Pence summoned local counsel to his chambers and announced that Judge Tavares, who had presided over all proceedings to that point including the settlement proceedings, was ill and that Judge Pence would preside over the hearing on the motion to set aside the appraisals. Judge Pence also ruled, *without any hearing what-*

10. The appraisers similarly disregarded their instructions in appraising Puna.

soever, that only the appraisers would be permitted to testify at the hearing, and quashed subpoenas which petitioners had served on executive officers of Amfac for the purpose of proving that Amfac had made fraudulent misstatements and omissions to the appraisers. (Tr., November 24, 1972, at pp. 2-3, 12-13, 15-17; Rec., pp. 6039-61.)

The testimony of Root and Frederick Pape ("Pape"), the Eastman Dillon partner who performed and supervised the appraisals, conclusively established that although Pape had instructed Root to appraise *all* of the real estate owned by the Plantations, **no net asset or theoretical liquidation value appraisal had been performed of any of the real estate employed in sugar operations.** (Tr., December 4, 1972, at pp. 43, 46, 51, 58, 70-71, 207-08, 302-03, 396, 398.) For example, Root testified (*Id.*, p. 43):

> "Q. What is the value that you, as a real estate appraiser, give to the assets of Lihue which were used, in your opinion, the twenty-nine-some-odd thousand acres, which were, as you say, essential for the production of sugar? What was the value that you placed on that as an MAI appraiser?
>
> **A. I did not place a value on it."**[11] (Boldface added.)

Similarly, Pape testified (*Id.*, p. 302-03):

> "Q. Can you tell us in court today what the value on liquidation of the 29,266 acres of Lihue involved in sugar operations would be?
>
> * * *
>
> THE WITNESS: No." (Boldface added.)

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11. Root was required under the terms of the settlement agreement and instructions to appraise the net asset or *theoretical* liquidation value for Eastman Dillon's mandated use in the consideration of net asset value. Significantly, Root testified that he *could have performed* a liquidation appraisal, but did not do so. (Tr., December 4, 1972, pp. 50-51, 70-71.)

Judge Pence succinctly summarized the testimony of Root and Pape when he stated (*Id.*, p. 207-08):

> "THE COURT: I'll state frankly, **there is no one in the courtroom who knows what 29,000 acres of Lihue would be worth.** On all of the evidence before me, that's the only conclusion." (Boldface added.)

Incredibly, Root conceded that the real estate employed in sugar operations "unquestionably [had] some potential future value," but that he had not determined what that value was. Thus, Root could *not* state whether the future value of Lihue's substantial real estate holdings was *more or less* than the $5,000,000 valuation determined by Eastman Dillon *solely* on the basis of a capitalization of earnings. (*Id.*, pp. 114-155.) When Pape was asked what value was given for the unquestionable future potential of the sugar lands, he admitted: "*We gave no value to that.*" (Id., pp. 290-97.)

G. Proof of Fraud

At the hearing, petitioners made an offer of proof that Amfac had made numerous representations of material facts to the appraisers, relied upon by the appraisers in valuing the Plantations' stock, which were flatly contradicted by Amfac's own documents and records. (Tr., December 4, 1972, at pp. 433-41.) Nonetheless, Judge Pence, who earlier had quashed petitioners' subpoenas without any hearing, denied petitioners' renewed request to examine or depose any of the executive officers of Amfac to support petitioners' allegation of actual or constructive fraud, thereby rendering proof thereof impossible.[12]

H. The Decision of the District Court

On March 19, 1973, Judge Pence issued his decision denying petitioners' motion to set aside the appraisals.

12. Judge Pence also refused to admit into evidence any of the contradictory Amfac documents. (Tr., December 4, 1972, at pp. 436-40.)

(App., pp. A4-A24.) In so ruling, however, Judge Pence *did not* find that there was any disagreement or misunderstanding among the parties as to the meaning of the instructions to the appraisers which they jointly had drafted. To the contrary, *Judge Pence found that all parties "assumed that the Delaware definition is the only way 'net asset value' can be considered, i.e., net asset value must be equated with liquidation value."* (App., p. A17). (Italics added.) Notwithstanding the clear intent of the parties who, in recognition of the vital importance of the net asset value of the Plantations' substantial real estate holdings, jointly drafted both the settlement agreement and the carefully worded instructions to the appraisers, and ignoring the elaborate efforts of petitioners, to insure a fair and independent appraisal of the substantial real estate holdings of the Plantations, Judge Pence concluded that "Eastman Dillon . . . was not compelled to operate under Delaware's [and the parties'] definition of net asset value" (App., p. A18), but could employ the "more general definition" of net asset value (App., p. A19). Judge Pence further found that the appraisers in fact had performed their appraisals "within the guidelines of the more general definition of net asset value, rather than of the definition established by the Delaware courts [and the parties]." (App., p. A22.)

Having precluded petitioners from examining or deposing any of Amfac's officers and from introducing into evidence any contradictory Amfac documents, Judge Pence also found the record devoid of any evidence of fraud in the appraisals. (App., pp. A10-A11.)

I. The Decision of the Court of Appeals

On May 16, 1973, petitioners filed their Notice of Appeal, and on or about August 10, 1973, respondent Amfac filed with the Court of Appeals a motion to dismiss on the grounds that the Stipulation of Settlement provided that the appraisers' value determination would be final and

binding and therefore precluded even a challenge based upon the charge that the appraisers had disregarded their mandatory instructions.

On August 14, 1973, petitioners filed their opening brief on the merits and on August 20, 1973, filed their response in opposition to Amfac's motion to dismiss, relying, *inter alia*, upon *Marceron v. Chevy Chase Services, Inc.*, 258 F.2d 155 (D.C. Cir. 1958). Significantly, in *Marceron*, then Circuit Judge and now Chief Justice Warren Burger held that the issue of whether appraisers had properly interpreted their instructions and had performed their duties in the manner instructed were questions purely of law and subject to *de novo* review by a court of appeals notwithstanding an agreement that the values determined by the appraisers would be binding.

On September 13, 1973, 11 days *prior* to the time for the filing of petitioners' reply brief on the merits, and without oral argument or notice that the case would be submitted without oral argument in accordance with Rule 3(a) of the Local Rules of the Ninth Circuit, the *motion panel* entered a *per curiam* Memorandum Opinion *denying* Amfac's motion to dismiss the appeal, but affirming the judgment below on the merits. (App. pp. A1-A2.) The motion panel's Memorandum Opinion stated simply that "[w]e have examined Judge Pence's construction of Judge Tavares' instructions to the appraisers, and we have concluded that Judge Pence did not err in his interpretation of them." (App., p. A1.) Significantly, however, in a marked departure from the holding of the District of Columbia Circuit in *Marceron v. Chevy Chase Services, Inc., supra*, the motion panel erroneously refused a *de novo* review (App., p. A2):

> "Unfortunately for appellants, the scope of judicial review available to them on the basis of their stipulation and the orders of the court predicated

upon their agreement is far more restrictive than that which would have been accorded without the settlement agreement."

Despite the fact that Judge Pence arbitrarily had rejected petitioners' efforts to establish their charge of fraud, the motion panel also held that "[t]o the extent that extrinsic fraud was charged, Judge Pence found against the appellants and there is no basis in the record to upset that determination.' (App., p. A1).

On September 24, 1973, petitioners filed a petition pursuant to Rules 35 and 40 for reconsideration of the *per curiam* memorandum opinion affirming judgment, for leave to file their reply brief on the merits, for oral argument on the merits and suggestion of appropriateness of reconsideration *en banc*, to which their reply brief on the merits was appended. On October 19, 1973, the same motion panel filed a *per curiam* order allowing petitioners to file their reply brief, but denying oral argument and, without further explanation, "adhere[d] to its prior Memorandum [Opinion]." (App., p. A3.) No disposition of petitioners' suggestion of appropriateness of reconsideration *en banc* was ever announced.

REASONS FOR GRANTING THE WRIT

A. The Decisions Below Undermine and Thwart Important Public Policies in the Administration and Enforcement of the Federal Securities Laws.

(1) The Decisions Below Deter Expeditious Settlement of Federal Securities Class Action Litigation.

This case is of exceptional importance to the courts, to the national corporate community, to the federal securities law bar and to the administration and enforcement of the federal securities laws because its resolution will determine the future likelihood of efficient and economical settlements of securities cases which provide for Court-supervised appraisals pursuant to jointly drafted instructions rather than protracted and expensive jury trials.

There was no dispute between the parties as to the meaning of the mandatory, jointly drafted instructions. **Amfac conceded** that "net asset value is defined as a theoretical liquidating value to which the share would be entitled upon liquidation of the company" and **"must be weighed** in arriving at a determination of the value of stock." (Rec., p. 5804.) (Boldface added.) The district court found that all parties "assumed that the Delaware definition is the only way 'net asset value' can be considered, *i.e.*, net asset value must be equated with liquidation value." (App., p. A17.) Nonetheless, despite the clear contrary understanding and intent of the parties and despite the fact that the value of the Plantations' substantial real estate holdings was the "ultimate principal issue" in the case, the district court concluded that the appraisers were "not compelled to operate under Delaware's [and the parties'] definition of net asset value" (App., p. A18) and approved appraisals which *disregarded the mandatory instructions*[13] and decimated the settlement agreement by

13. "You **shall** consider all relevant value criteria which **shall** include . . . net asset value. . . . In the consideration of net asset

valuing the Plantations' real estate employed in sugar operations *solely* on the basis of a capitalization of earnings *without any appraisals of or weight given to the net asset or theoretical liquidation value of said lands.* This conclusion abrogated the settlement agreement and denied the defrauded parties the very consideration for which they had bargained, *i.e.* independent appraisals performed in the precise manner agreed upon by the parties and mandated by the jointly drafted instructions.

To allow Judge Pence's reported decision[14] to stand in light of his express recognition that the appraisers' performance of their duties did not comport with what the parties intended and understood their instructions to require would be to sound the death knell for settlement of federal securities class actions in the fair, efficient and economical manner achieved herein.

(2) The Decisions Below Permit Amfac to Retain the Extraordinarily Valuable Bounty of its Fraudulent Conduct.

Beyond question, the 1934 Act is remedial legislation and, as such, must be construed broadly to effectuate its purposes. "One of its central purposes is to protect investors through the requirement of full disclosure," *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967), and private enforcement of the 1934 Act is vital to the fulfillment of its remedial purposes. *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

A necessary corollary of the remedial purposes of the 1934 Act and the importance of private litigation to the achievement of those purposes is that those who violate the Act's provisions must be made to fully disgorge their ill-

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Note 12—*Continued*

value you **shall** utilize the services of Gilbert W. Root, MAI, of Honolulu, Hawaii, *as real estate appraiser* . . . ." (App., p. A26) (Italics and boldface added.)

14. 59 F.R.D. 116 (D. Haw. 1973).

gotten gains. Here, summary judgment on liability under Section 10(b) of the 1934 Act was granted against Amfac. An adjudication of liability under the 1934 Act would be a hollow and meaningless gesture with no deterrent effect whatever if wrongdoers such as Amfac were permitted to escape with the fruit of their fraud. As Chief Judge Aldrich stated in *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965), *cert. denied*, 382 U.S. 879 (1965): "It is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them . . . it is simple equity that a wrongdoer should disgorge his fraudulent enrichment."

In *J. I. Case Co. v. Borak, supra*, this Court emphasized the duty and power of the federal courts to provide such remedies as are necessary to vindicate federal rights and effectuate the congressional purpose (377 U.S. at 433):

> "[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. . . ."
>
> * * *
>
> ". . . 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. . . .'"

Just as the 1934 Act itself must be broadly and liberally construed in a manner which effectuates its remedial purposes, so too proceedings to implement a settlement after a party has been found guilty of federal securities law fraud must give effect to the remedial purpose of compelling the wrongdoer to disgorge his illegal gains. Petitioners bargained away their right to jury trials on the issue of damages in consideration for a court-supervised independent appraisal to determine stock values *pursuant to jointly drafted mandatory instructions.* The detailed instructions were drafted by the parties having

thorough knowledge of the facts and history of the litigation and were a *sine qua non* to any settlement agreement. Through inadvertence, ignorance, fraud or otherwise, the appraisals challenged herein have *left unvalued* what the parties agreed was the "ultimate principal issue" of the case and thereby have permitted the wrongdoer to escape with its multimillion dollar spoils.

From the outset of this litigation, it was recognized by all parties that the "ultimate principal issue" was the value of the Plantations' substantial real estate holdings. The appraisals were agreed upon for the purpose of ascertaining this value and incorporating it into the fair value of the Plantations' stock. It was for this reason alone that the appointment of real estate appraiser Gilbert W. Root, MAI, was expressly incorporated in the instructions and "net asset value" was highlighted by separate and individualized attention therein. None of the elaborate procedures for instructing the appraisers would have been necessary if the parties had intended to permit them, as Judge Pence has done, to disregard their instructions and proceed in their unfettered discretion.

Moreover, although the record was replete with instances in which the appraisers, in performing their appraisals, relied upon self-serving representations of Amfac, representations contradicted by Amfac's own documents and records, the district court denied petitioners even a minimal opportunity to examine Amfac's officials to establish the false and fraudulent nature of those representations[15] and refused to admit into evidence the contradictory Amfac documents.

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15. Other than the statement of the motion panel of the Ninth Circuit that "[t]o the extent that extrinsic fraud was charged, Judge Pence found against the appellants and there is no basis in the record to upset that determination" (App., p. A1), the Court of Appeals never explained on what basis it affirmed Judge Pence's refusal to permit petitioners to establish a record as to fraud by examining the only persons through whom the fraudulent nature of Amfac's representations to the appraisers could be demonstrated, *i.e.* Amfac's executive officers.

This Court should review these decisions to give substance to the remedial purposes of the 1934 Act.

B. The Refusal of the Court of Appeals to Perform a *De Novo* Review of Whether the Appraisers Performed their Appraisals in Accordance with their Instructions is in Conflict with the Decision of the District of Columbia Circuit in *Marceron v. Chevy Chase Services, Inc.*, 258 F.2d 155 (D.C. Cir. 1958).

In direct conflict with the decision of the District of Columbia Circuit in *Marceron v. Chevy Chase Services, Inc.*, 258 F.2d 155 (D.C. Cir. 1958), the Ninth Circuit here exercised a restrictive scope of judicial review to determine whether the appraisers had performed their appraisals in accordance with their instructions. In *Marceron*, a lease agreement similarly provided for appraisals to be binding upon the parties. The trial court refused to review the appraisers' interpretation of their instructions and held that the parties were bound by the appraisal. On appeal, then Circuit Judge of the District of Columbia Circuit and now Chief Justice Warren Burger reversed the trial court, declaring (258 F.2d at 158-59):

> "Thus it appears that the appraisers' construction of the formulae can properly be reviewed by the trial court *and* by us. The appraisers' construction of the formulae, as distinguished from appraisal of value, being untra vires, is clothed with no presumption of correctness. The trial court's affirmance of the appraisers' determination is likewise no obstacle to *de novo* construction in this court, first because the trial court's decision was based partly on an erroneous ground, namely that the appraisers' interpretation of their charter of authority was conclusive on the parties; and second, because unlike the question of land or rental value, **it is one purely of law** and involves only contruction of a written instrument." (Italics and boldface added.)

Had the Ninth Circuit reviewed *de novo* the appraisers' interpretation of their instructions, it would have been compelled to reverse in light of the facts that: (1) the parties were in agreement that under the Stipulation of Settlement and jointly drafted instructions, the appraisers were *required* to determine the theoretical liquidation value of the Plantations' real estate employed in sugar operations and to give some weight to said value in the ultimate determination of the value of the Plantations' stock; and (2) the appraisers admittedly did not determine the theoretical liquidation value of said real estate and, therefore, gave no weight to that criteria in fixing the value of the Plantations' stock.

This Court should resolve this conflict between the Circuits and correct the manifest injustice to the minority shareholders of these Plantations.

CONCLUSION

By disregarding their instructions and failing to appraise and include the most essential element of the value of the Plantations' stock, *i. e.*, the theoretical liquidation value of their substantial real estate holdings, the appraisers have deprived the minority shareholders, *who had been awarded summary judgment on liability*, of the appraisals for which they bargained in the settlement of this action. Thus, Amfac, a party found guilty of securities law fraud, has been permitted to retain the extraordinarily valuable bounty of its fraud.

Moreover, by denying petitioners' the opportunity to examine Amfac's officers to support their allegations, Judge Pence deprived petitioners of the hearing on the issue of fraud to which they were entitled.

For the foregoing reasons, it is respectfully submitted that this Honorable Court should issue a writ of certiorari

to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 1973, three copies of this Petition for a Writ of Certiorari were served, by first class air mail, postage prepaid, on the attorneys for respondent Amfac, Inc. I further certify that all parties required to be served have been served.

/s/ BRUCE W. KAUFFMAN
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2365

DERICKSEN M. BRINKERHOFF, etc., et al., *Appellants*
v.
AMFAC, INC., et al., *Appellees*

MEMORANDUM

Before: KOELSCH, HUFSTEDLER, and
WALLACE, *Circuit Judges*

September 13, 1973

PER CURIAM:

Although appellants insist that they seek only to attack Judge Pence's construction of Judge Tavares' instructions to the appraisers, it is evident that the attack would be pointless unless the real aim were to upset the valuations reached by the court-appointed appraisers. Appellants recognize, or they must, that they are in a situation directly analogous to one who seeks to upset an arbitration award. Accordingly, their only hope in turning over the "award" is to claim that it was the product of extrinsic fraud or that the "arbitrators" exceeded the scope of the submission and thus acted outside their jurisdiction.

To the extent that extrinsic fraud was charged, Judge Pence found against the appellants and there is no basis in the record to upset that determination.

We have examined Judge Pence's construction of Judge Tavares' instructions to the appraisers, and we have concluded that Judge Pence did not err in his interpretation of them.

Appellants are understandably distressed by the valuations reached by the appraisers. Unfortunately for appellants, the scope of judicial review available to them on the basis of their stipulation and the orders of the court predicated upon their agreement is far more restrictive than that which would have been accorded without the settlement agreement.

The motion to dismiss the appeal is denied. Sanctions are denied. The judgment is forthwith affirmed.

nm 8/28/73

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DERICKSEN M. BRINKERHOFF, etc., et al., *Appellants*

v.

AMFAC, INC., et al., *Appellees*

No. 73-2365

ORDER

Before: KOELSCH, HUFSTEDLER, and WALLACE, *Circuit Judges*

October 19, 1973

Appellants' reply brief is ordered filed. The court has reconsidered its decision in the light of the appellants' reply brief and its brief in support of its present petition for reconsideration and for other relief.

The court in granting summary affirmance suspended the rules pursuant to Rule 2 of the Federal Rules of Appellate Procedure in the interests of expediting the decision.

The cause has been thoroughly briefed. The court has also had the benefit of the transcript of the extended oral argument before Judge Pence. We are of opinion that oral argument would not materially assist the court in resolving the narrow issues that the appeal presents.

Accordingly, upon reconsideration, oral argument is denied, and the court adheres to its prior Memorandum.

nm 9/26/73

mocal 8/20/73

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ROGER JON DIAMOND, Trustee of the Northern Acceptance Trust 1065, and DERICKSEN M. BRINKERHOFF,

Plaintiffs,

v.

AMFAC, INC., et al., *Defendants.*

Civ. No. 70-3107.

March 19, 1973

DECISION ON CHALLENGE TO THE VALIDITY OF EASTMAN DILLON'S APPRAISALS

PENCE, Chief Judge.

As appears hereafter, this latest suit challenges the validity of appraisals of stock value of Lihue Plantation Company, Ltd. (Lihue), Puna Sugar Co., Ltd. (Puna), and Kekaha Sugar Co., Ltd. (Kekaha) (collectively referred to as the "Plantations").

A review of the facts here relevant shows that in July 1968, defendant Dean Witter & Co. performed an appraisal which established a stock exchange share ratio[1] for a proposed merger of each of the Plantations into defendant Amfac, Inc.[2] Subsequently, the Boards of Directors of the

1. In its appraisal, Dean Witter valued Lihue stock at $66 per share, Puna stock at $25 per share, and Kekaha stock at $38 per share. Comparing these figures with the then (July 1968) market price of Amfac stock, Amfac management established an exchange ratio of 1.2 shares of Amfac common stock for each Lihue share, .50 share of Amfac common stock for each Puna share, and 1 share of 6¼% Amfac Convertible Preferred Stock for each Kekaha share.

2. Prior to the merger Amfac owned 85.63% of the outstanding shares of Lihue, 93.12% of Puna, and 61.60% of Kekaha,

Plantations and of Amfac approved the proposed mergers. The Boards of the Plantations called for special shareholder meetings, as are required to approve mergers, and in the process solicited proxies of the shareholders. At the meetings, an overwhelming percentage of the shares represented were cast in favor of the mergers,[3] and the mergers took effect in early January 1969.[4]

Shortly thereafter, plaintiffs Northern Acceptance Trust 1065 and Dericksen M. Brinkerhoff brought a class action suit in this court on behalf of all minority shareholders of the Plantations[5] and derivatively on behalf of the Plantations against, among others, Amfac and the Plantations as well as their officers and directors, and Dean Witter. Plaintiffs alleged that defendants had violated section 17(a) of the Securities and Exchange Act of 1934, breach of common law fiduciary duties, and fraud. More particularly, defendants were alleged to have issued false and misleading proxy statements to the minority shareholders for the purpose of obtaining their approval of the mergers which operated to the detriment of the minority shareholders. Plaintiffs noted that the proxy statement failed to disclose, *inter alia*, the past relationship between Amfac and Dean Witter, which had performed the appraisal which established the exchange ratios for the

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3. Voting results of the special shareholders meeting of October 31, 1968 (PX 40):

	Shares Represented at Meeting	In Favor	Opposed
Lihue	96.45%	93.28%	3.18%
Puna	98.34%	98.21%	.13%
Kekaha	93.26%	92.46%	.67%

4. Mergers in Hawaii take effect upon filing with the Hawaii Department of Regulatory Agencies. Thus the Lihue and Puna mergers took effect on January 9, and Kekaha the next day.

5. Not every class member owned stock in all of the three Plantations.

merger, as well as the relationship between Ralph E. Phillips, Sr., a senior partner of Dean Witter, who was also an Amfac board member. As a result, plaintiffs alleged, Dean Witter did not perform its appraisal in an independent and impartial manner, and caused the minority shareholders to receive less than fair value for their stock.

On May 5, 1971, Judge Tavares, of this court, granted plaintiffs' motion for summary judgment on the issue of liability under section 10(b) of the Securities and Exchange Act of 1934 against certain defendants, including Amfac and the Plantations. Subsequently, the parties entered into a Settlement Agreement which was submitted to and approved by Judge Tavares.

The terms of the agreement, here relevant, provided (1) for the impartial reappraisal of the stock of each of the Plantations at the time of the mergers, *i. e.*, January 1969. (2) To perform the reappraisal, an independent investment banking firm would be selected by the court and act under the court's "sole direction and supervision." (3) The court would further instruct the firm to "consider all relevant value criteria, including, but not limited to, market price, net asset value and investment value," and, in its consideration of net asset value, "to utilize, under [the firm's] direction, the services of an independent real estate appraiser." (4) To assure the independent judgment of the firm and of the real estate appraiser, both would be made officers of the court, and both would be paid by the court for their services.

Other terms of the agreement provided that the firm would have six months in which to file its report with the court, after which the parties could file written responses to the report with the firm. The firm could "adopt or reject [the comments] in whole or in part as it deems advisable."

At the hearing on the approval of the agreement the court said that, "Absent fraud or collusion, the appraisals prepared by the investment banker will be final, conclusive and binding on the parties, and no appeal or review will lie therefrom." Thereafter, on February 14, 1972, Judge Tavares appointed Eastman Dillon, Union Securities & Co. (Eastman Dillon) as the firm to perform the stock appraisals, and Gilbert W. Root (Root), a Hawaii resident, as the real estate appraiser to assist Eastman Dillon. Judge Tavares found that both were qualified and independent.

Soon thereafter, Judge Tavares issued his instructions to the appraisers, in conformance with the agreement.[6] In order to assure that the appraisers maintained their impartiality and independence, Judge Tavares imposed strin-

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6. The court's instructions to Eastman Dillon were:

It is the duty of Eastman Dillon, as the investment banker, to appraise the value of a share of capital stock of each of the three Plantations as of January 1, 1969 in the manner ordinarily, customarily and usually recognized in your profession for the purpose of determining exchange ratios in merger situations. You shall consider all relevant value criteria which shall include but not necessarily be limited to market price, net asset value and investment value. In the consideration of net asset value you shall utilize the services of Gilbert W. Root, M.A.I., of Honolulu, Hawaii as real estate appraiser who, under your supervision, shall appraise the value of such of the real estate of each of the three Plantations as directed by you. In the consideration of market price, you should discount or exclude quotations and sales reflecting the expectation of increased or decreased value as a result of the announcement on July 24, 1968 of the intention to merge the Plantations into Amfac, Inc.

The court's instructions to Root were:

Mr. Root, it is your duty, as the real estate appraiser, to appraise the value of such of the real estate of each of the three Plantations as directed by Eastman Dillon for Eastman Dillon's use in the consideration of net asset value. Although you are to perform your appraisals under the direction of Eastman Dillon, you are to reach your own independent judgment as to the value of the real estate appraised and you are to perform your appraisals in the ordinary, customary and usual manner recognized by your profession.

gent requirements governing and surrounding the performance of the appraisals.[7]

Under the direction of Eastman Dillon, Root made his real estate appraisals and submitted his report to Eastman Dillon in early July 1972. Subsequently, on September 5, 1972, Eastman Dillon filed its report.[8] Eastman Dillon concluded that the value of Lihue stock as of January 1969 was $88.00 per share; of Puna stock, $31.00; and of Kekaha stock, $43.00. Eastman Dillon compared these values with the relevant market price of Amfac stock[9] which, when computed according to the exchange ratio, was the equivalent of $93.37 per share of Lihue stock, $38.91 per share of Puna stock, and $55.85 per share of Kekaha stock. Thus, the net effect of these figures demon-

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7. The court's supervision of the appraisers is as follows:

In conducting these appraisals, you shall serve as officers of this Court under this Court's sole direction and supervision. Your fees will be paid to you by this Court. Accordingly, it is essential that your performance be independent and impartial both in fact and in appearance. I therefore instruct all parties, their counsel and all other persons subject to this Court's jurisdiction not to initiate any contact or communication with either of you for any reason without prior approval of this Court. If any person attempts, directly or indirectly, to initiate any contact or communication with you with respect to any aspect of these appraisals without approval of this Court, you are instructed to advise this Court immediately of that fact, and appropriate action shall be taken. On the other hand, you are authorized to request relevant factual information from any party or counsel, who shall respond to such request without further order of this Court. Moreover, you are authorized to approach this Court with respect to any question which may arise.

8. Eastman Dillon subsequently filed a more comprehensive report which, by order of Judge Tavares, became the "original" report.

9. Under the terms of the Settlement Agreement, the value of a share of Amfac stock would be determined by computing the average closing price of a share of the stock traded on the New York Stock Exchange during January 1969.

strated that the value of a share of any of the Plantations' stock did not exceed the value of the Amfac stock which shareholders of the several Plantations had theretofore received under the terms of the mergers and that the minority shareholders in fact benefited from the challenged exchange.

Subsequently, after Eastman Dillon filed its report, both plaintiffs and Amfac filed written comments with Eastman Dillon in accordance with the Settlement Agreement and the order of the court. After considering the comments, Eastman Dillon decided not to change its conclusions.

On August 18, 1972, Judge Tavares, having "expressly reserved jurisdiction . . . for the purpose of implementing, supervising and enforcing the terms of the settlement of which the appraisals are an integral and essential part",[10] scheduled a hearing on the questions now before this court, *i. e.*, whether the Eastman Dillon appraisals should be set aside as a result of fraud or other error. On November 6, 1972, plaintiffs also filed a motion to set aside the appraisals, alleging fraud and other irregularities. A two and one half day hearing was held before this judge[11] to consider these matters. Thereafter the parties filed post hearing memoranda.

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10. Here, judicial supervision is required even though the parties had agreed that the appraiser's conclusions would be final, conclusive and binding on the parties and not subject to review or appeal. The instructions issued by Judge Tavares, which assured the impartiality of the appraisal, did not supersede the court's supervisory power to determine whether there was fraud or error in the appraisal.

11. Judge Tavares was very ill in the latter part of 1972.

Findings of Fact and Conclusions of Law

The court is satisfied that neither Eastman Dillon nor Root committed any fraud whatsoever in this case. Nor did plaintiffs proffer any evidence of actual fraud in the performance of their duties.

Plaintiffs also urge setting aside the appraisals on a constructive fraud theory, largely on the authority of a Hawaii taxpayer's case, *Von Holt v. Izumo Taisha Kyo Mission*, 42 Haw. 671, 721-723 (1957).[12] Plaintiffs in effect argue that certain appraisal techniques used as well as some not used by the appraisers resulted in what amounts to false appraisals, and thus constitute constructive fraud under the reasoning of *Von Holt*.

As more fully discussed hereafter, this court finds that the use or non-use of certain appraisal techniques or methods by Eastman Dillon and Root were matters of professional selection and judgment. Therefore, unless plaintiffs were able to show that false representations had been made, that certain techniques and methods were used or not used by the appraisers, would not, per se, constitute or result in constructive fraud. Neither in plaintiffs' memoranda nor at the hearings have they shown any such false representations on the part of either appraiser.

Plaintiffs' attack upon Eastman Dillon's appraisals on their theory that certain appraisal methods should or should not have been used, therefore can succeed only if plaintiffs have shown as a matter of law that the methods actually applied by the appraisers constituted such error

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12. In *Von Holt*, the City and County of Honolulu had conveyed a certain real property to an eleemosynary corporation under a statute which enabled the City to reconvey donated property back to its donors. The Hawaii Supreme Court found that the corporation had falsely represented to the City that it (the corporation) was the same entity which had donated the property. On the basis of this false representation, the court found that constructive fraud was committed.

as would require this court as a matter of law to set aside the appraisals. Obviously, if the court finds no such error, then it must permit the appraisals to take effect as agreed to by the parties.

Plaintiffs' primary allegation of such error is that the appraisers failed to perform their appraisals according to the instructions of Judge Tavares, asserting that a net asset value analysis was not performed as instructed. In particular, plaintiffs claim that Eastman Dillon's failure to instruct Root to conduct a separate real estate appraisal of the sugar-producing lands of the several Plantations, and Root's failure to perform such appraisal, resulted in an incomplete appraisal by Eastman Dillon of the value of plaintiffs' stock, thus constituting error. Similarly, plaintiffs allege that the value of certain corporate assets which are related to sugar production, *i. e.*, the growing crops, C & H stock, and Kauai Storage, should have been separately valued and included in the net asset analysis performed by Eastman Dillon, and their omission thus also constituted error.

As set out fully in note 6, *supra*, Judge Tavares instructed Eastman Dillon to "consider all relevant value criteria which shall include but not necessarily be limited to market price, net asset value and investment value"; and Root was instructed "to appraise the value of such of the real estate of each of the three Plantations as directed by Eastman Dillon for Eastman Dillon's use in the consideration of net asset value." Both were further instructed to perform their appraisals "in the manner ordinarily, customarily and usually recognized" in their respective professions.

The evidence shows that in its appraisal of the value of the stock of each Plantation, Eastman Dillon first considered the use of the market price of the Plantations' stocks as one method of valuation. However, because the

stocks were thinly traded,[13] Eastman Dillon found that this method was not particularly relevant.[14]

Similarly, to the extent that under the investment value approach, the value of a share of stock is *wholly* dependent on the capitalization of earnings, Eastman Dillon considered but did not apply that method.[15] As the record

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13. The stock of each Plantation was traded on the Honolulu Stock Exchange. Between January 1966 and June 1968, only 2,890 shares of Lihue stock were traded out of 231,946 shares outstanding; 530 shares of Puna stock were traded out of 242,752 shares outstanding; and 1,675 shares of Kekaha stock were traded out of 200,000 shares outstanding. The small quantity of stock traded may, of course, be largely attributed to Amfac's majority ownership of the shares of each Plantation. *See* note 2, *supra*.

Given the limitations of thin markets, it may nevertheless be noted that Eastman Dillon's valuations exceeded the market price of the stock of the Plantations. In the five years preceding the merger, the highest price at which Lihue stock was trade was $62 per share, whereas Eastman Dillon's appraisal value was $88 per share; for Puna stock, the highest price was $21 compared with Eastman Dillon's $31 per share; and for Kekaha stock, the highest price was $32 per share, compared with Eastman Dillon's $43 per share.

14. Letter from Frederick Pape, General Partner, Eastman Dillon, to The Honorable C. Nils Tavares, United States District Judge, October 2, 1972, at 4—5 (hereinafter referred to as Eastman Dillon Appraisal Report).

15. The "investment value" method involves the application of a capitalization rate to the normal income of a company. By multiplying the income figure (usually the average annual income over a period of time, normally five years) by the capitalization rate (determined by considering the industry's capitalization rate, the company's position in the industry, companies in like situations, and other factors considered relevant by an experienced investment banker), and then by dividing the result by the number of shares outstanding, the "investment value" figure is obtained. It should be noted here that although the capitalization of earnings may be used to determine the investment value of a company's shares, a similar capitalization of earnings may also be used in determining the value of specified assets. To distinguish the two, the latter method of capitalization of earnings is designated the "going concern" method of valuing *assets*.

indicates, Eastman Dillon reasoned that the sole use of the investment value method for the instant appraisals undervalued the fair value of the stock since underlying asset values, they felt, were not adequately reflected in earnings.[16] Thus, eventually Eastman Dillon used the net asset value method to make its valuations.

As instructed by the court, under Eastman Dillon's direction, Root performed his appraisal of the land and improvements of the Plantations. With regard to the sugar-producing assets, including the sugar-producing lands and improvements, Root recommended to Eastman Dillon that these assets be valued on a going-concern basis. He had decided that the highest and best use of the sugar-producing assets was just that, *i. e.*, their present agricultural use, and he recommended that they be appraised accordingly. As investment bankers, Eastman Dillon was more properly qualified and experienced to select the appropriate capitalization rate and income figure. Eastman Dillon agreed with Root as to the use of the going-concern method, *i. e.*, taking the capitalization of earnings to determine the value of the sugar-producing assets. Therefore, in its analysis, Eastman Dillon applied the capitalization of earnings to the sugar-producing assets of the Plantations to determine the value of those assets.

Further, Root of course appraised the non-sugar producing lands, improvements and assets of the Plantations. The value of the non-sugar producing assets were then added to the value of the sugar-producing assets to determine the net asset value of the Plantations. This net asset value was then divided by the number of shares out-

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The significant difference is that for the "going concern" method the capitalization of earnings is used to determine the value of those particular assets which produced the income. On the other hand, the investment value method is used to determine the value of a share of stock by looking to the total earnings of the company, not to the earnings of any particular assets.

16. Eastman Dillon Appraisal Report, *supra* note 14, at 4.

standing to determine the value of the shares of the Plantations.

Plaintiffs argue that this method of analysis and appraisal was error because Root did not "appraise", *i. e.*, fix a market price upon, the sugar-producing lands of the Plantations contrary, allegedly, to the instructions of Judge Tavares.

On its face, this argument appears not insignificant. As the record indicates, already high and continually rising real property prices are a fact of life in Hawaii. Anyone who is the least acquainted with present Hawaiian life would be impressed with the substantial rise in real property prices that have occurred within the past few years. Throughout the appraisal proceedings, plaintiffs set forth the probative force of these real property prices to the appraisers. This comprised the basic thrust of plaintiffs' objections to the appraisals.

One, however, can easily confuse the general rise in land prices with the more specific prices, and thus "values", of large parcels of land used for agricultural purposes on the Neighbor Islands.[17] The general rise in prices has usually been associated with significantly smaller parcels of land used for tourist-related, residential, commercial and speculative purposes. In turn, this price rise has put pressures on large landholders to release agricultural land for non-agricultural purposes, but where such lands have been released, they have largely been gradual and with limited acreage. The reasons for the improbability of any large-scale release of agricultural lands either on an immediate or gradual basis were fully explored at the hearing.

The economies of the Neighbor Islands are founded upon the large agricultural plantations, primarily for em-

17. *I. e.*, the main islands in the state other than the island of Oahu, on which Honolulu is located. The Plantations are on the Neighbor Islands.

ployment and revenues. As this court takes judicial notice, both in the Kahuku (Oahu) and Kohala (Hawaii) plantation closings, the state and county governments exert pressure to prevent the closing of any viable plantation. The State Land Use Commission and the zoning authorities of each county determine land uses, which uses of course largely determine land prices. In fact, between August 1964 through September 1968, only 285 acres of prime agricultural lands were approved for redistricting out of agriculture, although petitions representing 2,647 acres of such lands had been filed for such a change.

Further, any threatened shutdown of a viable plantation would (and has in both the Kahuku and Kohala closings) certainly draw the pressure of the International Longshoremen's and Warehousemen's Union. Since it represents all agricultural workers in Hawaii, the union wields substantial political (as the elections have shown) power, particularly on all of the Neighbor Islands.

There are other practical considerations to any large-scale release of agricultural lands. The marketability of such large parcels would be in doubt. The image of high priced land on sugar plantation holdings is further tarnished and eroded when one realizes that the plantations have a somewhat limited amount of level oceanfront land, the ideal and most demanded type of real property for tourist-related or speculative purposes. Moreover, any potential purchaser would certainly have to take into account the high land development costs, which require a large cash outlay for streets, water, sewage, and the like (all of which are now demanded by the several counties when subdivisions, hotels, etc., are built).

The same reasons which apply to the improbability of any large-scale release of the lands of the Plantations apply as well to the necessitated slower liquidation which would follow sale. The Plantations would face substantial losses from the forced disposal of the then surplus sugar-producing improvements and equipment. The Plantations

would also incur operational losses which would increase as cane acreage would be withdrawn. All this would substantially offset the proceeds obtained from the sale of substantial portions of the cane lands.

Prior decisions make it manifest that courts generally have deferred to the appraiser's expertise and have been inclined to support their determinations, absent any arbitrary or unreasonable findings.[18] Courts recognize that valuations of stock contemplate economic, rather than legal questions and that these questions, often complex since they vary with each case, should best be left to qualified appraisers who are knowledgeable about corporate securities and finance.[19] Even in the hands of expert appraisers, valuation is often complex and difficult.[20] Thus, courts are not so much concerned with the end "value" figure as they are with the soundness of the procedures and reasoning upon which that figure was obtained.[21]

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18. Jacques Coe & Co. v. Minneapolis-Moline Co., 31 Del.Ch. 368, 75 A.2d 244, 247 (1950); Flarsheim v. Twenty Five Thirty Two Broadway Corp., 432 S.W.2d 245, 259 (Mo. 1968); Warren v. Baltimore Transit Co., 220 Md. 478, 154 A.2d 796, 800 (1959); *accord*, Cummings v. United Artists Theatre Circuit, Inc., 237 Md. 1, 204 A.2d 795, 808 (1964); Knauff v. Utah Construction and Mining Co., 277 F.Supp. 564, 570, 579 (D.Wyo.1967), aff'd, 408 F.2d 958, 964-965 (10 Cir. 1969); *also*, Bache v. General Instrument Corp., 42 N.J. 44, 198 A.2d 759, 765 (1964); *also*, Jeffrey v. American Screw Co., 98 R.I. 286, 201 A.2d 146, 152 (1964); *also*, Note, Valuation of Dissenters' Stock Under Appraisal Statutes, 79 Harv.L.Rev. 1453, 1454 (1966) (hereinafter referred to as "Note on Valuation of Dissenters' Stock").

19. Jeffrey v. American Screw Co., *supra* note 18, 201 A.2d at 149; *see* Note Corporations: Shareholders: Appraisal Rights: Compensation to Shareholders Dissenting from Mergers and Consolidations, 40 Calif.L.Rev. 140, 145-46 (1952) (hereinafter referred to as "Note on Compensation to Dissenting Shareholders").

20. *See* notes 31-35 *infra*, and accompanying text.

21. The Court in Palmer v. Connecticut Ry., 311 U.S. 544, 559, 61 S.Ct. 379, 384, 85 L. Ed. 336 (1941), stated that, "All that can be done [to make a valuation] is to place before the court such facts and circumstances as are available to enable an estimate to be made based upon judgment and not guesswork."

Here, this court is satisfied that Root did give "proper consideration to all relevant facts" and that he had sufficient and reasonable grounds for his determination that the highest and best use of the sugar-producing lands was in their present use. This court finds that Root's valuation of the sugar-producing lands on a going-concern basis rather than on a liquidation basis was not loose guesswork, nor was it arbitrary or unreasonable. It conformed with Judge Tavares' instruction. It was not error.

Plaintiffs, however, urge that even assuming that the going-concern valuation may have been justified on rational grounds, Root, either as an M.A.I. or under a direction by Eastman Dillon to do so, should have made a real estate appraisal of the sugar-producing lands since, plaintiffs argue, the legal definition of net asset value so requires.

To support that proposition, plaintiffs cite extensively from *Poole v. N. V. Deli Maatschappij*,[22] wherein the Delaware Supreme Court defined net asset value as a theoretical liquidation value.[23] The record indicates that counsel for both the plaintiffs and defendants, deliberately or otherwise, assumed that the Delaware definition is the only way "net asset value" can be considered, *i. e.*, net asset value must be equated with liquidation value. As will appear hereafter, Delaware's constrictive definition is *not* the only way net asset value can be construed. Moreover, it was not so defined in the agreement nor did Judge Tavares' directions so state it. Eastman Dillon therefore was not compelled to operate under Delaware's definition of net asset value.

That definition by the Delaware and a few other courts[24] contemplates only those stock appraisal situations

22. 243 A.2d 67 (Del.1968).

23. *Id.* at 71.

24. *See* note 25 *infra* and accompanying text.

wherein what this court calls the Delaware "block" weighting methodology is used, *i. e.*, the market price, investment value, and net asset value methods (and in some instances dividend value) are independently blocked off and separately valued. Then these "block" values are each weighted to obtain a final valuation figure.[25] When separately valuating the stock in accordance with the forms of computation and used in each "block", the forms of computation for any one "block" should not be commingled with any forms in any other "block." To commingle the forms of computation by which the separate "block" valuations are performed would prejudice the blocked off independence by which the final figure under each "block" should be determined. Such severed independence is required since, as indicated above, the figure reached under each "block" must each then be weighted. After weighting the figures under each "block", the total of such weighted figures becomes the final valuation figure.

Under the "block" approach, then, the capitalization of earnings form of computation can only be used in computing an investment value figure. It cannot again be used in the net asset value figure. Thus the Delaware Chancery Court in *Felder v. Anderson, Clayton & Co.*[26] found error

25. Brown v. Hedahl's—Q B & R, Inc., 185 N.W.2d 249, 258 (N.D.1971); Tome Land & Improvement Co. v. Silva, 83 N.M. 549, 494 P.2d 962, 965 (1972); Application of Delaware Racing Association, 213 A.2d 203, 214 (Del.1965); *see generally* Note on Valuation of Dissenters Stock, *supra* note 18; Comment, Corporations—Standards of Valuation of Dissenters' Stock Under Appraisal Statutes, 51 Mich.L.Rev. 713 (1953). However, even in the cases mentioned above, the courts noted the difficulties which are inherent in the valuation of stock in each case. For example, the North Dakota Supreme Court, after examining the differences in valuation given to the three factors (blocks) by the Delaware courts in a number of cases, concluded, "[I]t is clear from a reading of the [Delaware] cases . . . that no simple valuation formula exists and that each case was decided on its own particular facts." Brown v. Hedahl's–Q B & R *supra*, 185 N.W.2d at 258.

26. 159 A.2d 278 (Del.Ch.1960).

when the appraiser applied a capitalization of earnings form of computation to determine the net asset value since "[the appraiser's approach] used an element of value [capitalized earnings] to determine the maximum value for another element [asset value]. It seems clear that the fair value of assets at a given date are not necessarily fully reflected in capitalized earnings as of that date . . . . One might turn it around and say that the capitalized earnings formula is unacceptable because it does not 'jibe' with the fair asset value. Could we say there was no asset value where the capitalized earnings figure was zero?"[27]

However, where the market price, investment value, and net asset value methods are not exclusively used, are not independently valued, and are not weighted, *i. e.*, when the Delaware "block" system is not employed, "net asset value" assumes its more general definition, viz., it is the value of all assets less any claims against such assets.[28]

Under that definition, there are four approaches to the determination of net asset value: book value, reproduction cost, going-concern value, and liquidation value.[29] An appraiser makes a net asset valuation by determining which approach to use with regard to each asset or group of assets. It may be that in one case, such as with equipment, that a reproduction cost value should be applied; in another case, such as with income-producing assets, a going-concern value should be applied. In any case, the appraiser must make the appropriate determination, based on an analysis of the relevant facts.

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27. *Id.* at 282; *accord*, Woodward v. Quigley, 257 Iowa 1077, 133 N.W.2d 38, 40, 136 N.W.2d 280 (1965).

28. Black's Law Dictionary (1968 ed.); Tri-Continental Corp. v. Battye, 74 A.2d 71, 74 (Del.1950).

29. Comment, Valuation Problems Created by the Dissenting Stockholder, 5 U.C.L.A. L.Rev. 295, 298-301 (1958) (hereinafter referred to as "Comment on Valuation Problems").

Here, the appraisers preformed their appraisals under the *general* definition of net asset value (as distinguished from the Delaware "block" system). Where the relevant assets were involved in sugar production, such assets were valued on a going-concern basis. This was a valid approach, for where a viable operation exists, courts and scholars generally agree that such assets should be valued on a going-concern rather than a liquidation value basis.[30] On the other hand, where the appraisers reasonably found on the facts that certain assets should more properly be appraised on a liquidation value basis, they so appraised such assets.

In making valuations, and with due deference to the "expertise" [plaintiffs' characterization] of the Delaware courts, this court holds that appraisers should *not* be confined in their analysis to rigid methods within only which

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30. *See* Comment on Valuation Problems, *supra* note 29, at 303; *also*, Note on Valuation of Dissenters' Stock, *supra*, note 18, at 1457; and *also*, Comment, Valuation of Dissenting Stockholders' Shares Under an Appraisal Statute, 23 Mo.L. Rev. 223, 229-30 (1958) (hereinafter referred to as "Missouri Comment on Valuation"):

> "The net asset theory may have either of two distinct implications. The first is that the merger situation is to be equated with a dissolution of the corporation. The second might be denominated an adjusted net asset approach in that the shares are to be valued as a continuing interest in a going concern. It is the latter of these two possible interpretations which is the truer determination of the value that is contemplated by the [valuation] statute. The shareholder has bought into a going concern. He has been deprived by majority action of his interest in the active enterprise. And it is for this interest that he should be remunerated. The use of a liquidation value is inappropriate. It makes the merger situation the equal of the dissolution, omitting all of the factors that are incident to the corporation's worth as a going concern. With the exception of the few early cases that have applied a liquidation-type theory, very few courts unequivocally advocate the use of such a system."

they may make their determinations,[31] nor that any one method is legally sacrosanct and *must* be used.[32] Rather, the court's basic concern in valuation cases is that the appraisers have considered all relevant value criteria[33] for

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31. "The ascertainment of value . . . is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." Standard Oil Co. v. So. Pacific Co., 268 U.S. 146, 156, 45 S.Ct. 465, 467, 69 L.Ed. 890 (1925). "Fair value is not susceptible of determination by any precise mathematical computation and no one formula or figure is binding or conclusive." Flarsheim v. Twenty Five Thirty Two Broadway Corp., *supra* note 18, 432 S.W.2d at 255; *see generally* Note on Compensation to Dissenting Shareholders, *supra* note 19, at 145. Perhaps the best characterization of the situation may be as follows:

> It is said that [valuation] standards may be grouped into two distinct categories. The first group are those value for which a definite mathematical figure can be achieved and includes market value, asset value and earnings capitalization. The other category are those elements which bear upon the worth of a share but cannot be derived by any computation. These may include the future potential of a company, frequency of dividend payments, caliber of management, and the relative position of the company in its industry. These represent vague considerations which are matters of personal judgment of the appraiser. Missouri Comment of Valuation, *supra* note 30, at 228, 232.

32. It is this precise form of assertion that one method should be controlling that prompted the Ohio Supreme Court to overturn a lawer court's instruction that one method of valuation should control. Roessler v. Security Savings & Loan Co., 147 Ohio St. 480, 72 N.E.2d 259-261 (1947).

33. Judge Tavares' instruction, too, called for the consideration of "*all* relevant value criteria." (Emphasis supplied.) Even in Tri-Continental Corp. v. Battye, *supra* note 28, 74 A.2d 71, 72, the Delaware Supreme Court stated that "the appraiser and courts must [consider] all factors and elements which reasonably might enter into the fixing of value [such as] market value, assets value, dividends, earnings prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger." *Accord*, In Re Olivetti Underwood Corp., 246 A.2d 800, 803 (Del.Ch.1968).

the express purpose of finding the value of the stock.[34] Although all such criteria should be considered by the appraisers, only those criteria that are relevant in any particular valuation need be analyzed.[35] This court's primary concern is with the accuracy and equity of Eastman Dillon's appraisal. Consideration of "all relevant factors entering into the determination of value does not mean that any one factor is in every case important or that it must be given a definite weight in the valuation . . . . The relative importance of several tests of value depends on the circumstances."[36] The claimed simplicity and certainty of the Delaware "block" system does not mandate this court —nor did it mandate Eastman Dillon—to adopt its use in this case.

Here, the appraisers determined on legally sufficient grounds that the appraisal of the fair value of the stock of the Plantations could best be achieved by performing their appraisal within the guidelines of the more general definition of net asset value, rather than of the definition established by the Delaware courts. In performing their appraisal, they gave "any benefit of the doubt to the minority [share]holders."[37] This court finds no error arising

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Note 33—*Continued*

Still, no list of factors is exclusive. The Iowa Supreme Court, after listing several relevant factors to be considered in valuation, went on to say, "It is unwise to attempt to state every factor that may bear on the value of stock in a particular case." Robbins v. Beatty, 246 Iowa 80, 67 N.W. 2d 12, 18 (1954).

34. "[The consideration of all factors should be] limited in their application to the single and exclusive and final purpose of finding and deciding fair market value [of the stock]." General Grain, Inc. v. Goodrich, 221 N.E.2d 696, 701 (Ind. App.1966).

35. Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 115 (Del. 1952); Woodward v. Quigley, *supra* note 27, 133 N.W.2d at 40.

36. Sterling v. Mayflower Hotel Corp., *supra* note 35, 93 A.2d at 115.

37. Eastman Dillon Appraisal Report, *supra* note 14, at 3.

from the appraisers' decision not to make a liquidation value analysis in using a net asset value method in their appraisal.

Having determined that the appraisal of the sugar-producing lands on a going-concern basis in the determination of net asset value was proper, this court also holds that the growing crops and the C and H stock were soundly included as part of the sugar-producing assets, and thus need not be separately valued. Similarly, this court finds that Root correctly gave a valuation to Kauai Storage by including its earnings as part of the income stream in valuing Lihue's sugar-producing assets. All three assets would necessarily be required in the continuity of the business of sugar production.

This court also finds that the appraisers did consider the value of the 50 acre parcel involved in the Princeville transaction and that Root properly evaluated it. The total consideration to be paid to Lihue by Eagle County Development Corporation for the entire transaction was $8,800,000. Root correctly assumed that the value of the 50 acre parcel was the difference between the $8,800,000 and $8,695,000 which was the consideration for all the land except the 50 acres.

This court has no problem in disposing of plaintiffs' other arguments which deal with the application of taxation by the appraisers. Plaintiffs argued that the appraiser should not have reduced the values of the non-sugar-producing assets by deducting a capital gains tax. Here, where the non-sugar-producing assets were valuated on a theoretical liquidation basis, which basis the appraiser had determined would bring the highest return to those assets, the capital gains tax would apply to determine their value.

Finally, plaintiffs argued that the appraisers should have used a 48 percent tax rate and not the 50 percent which they had used. The appraiser testified that this was the customary, average figure relied upon by investment

bankers. Further, the 50 percent rate appears to be fair in this case. The applicable federal tax rate in the periods involved was 22 percent on the first $25,000 and 48 percent on any additional income. The applicable Hawaii corporate income tax was 5.85 percent on the first $25,000 and 6.435 percent on the balance. Assuming $1,000,000 of taxable income and allowing the lower rate on the first $25,000 and a deduction for state income tax paid, the effective income tax rate for Hawaii corporation including the Plantations would be 50.48 percent.

This court finds that the appraisers fully and correctly performed their duty as provided by the Settlement Agreement and in accord with Judge Tavares' instructions, and that there was no error in any of the Eastman Dillon appraisals.

The motion to set aside the appraisals is DENIED, and the appraisals will take effect under the terms of the Settlement Agreement.

Defendants will prepare the judgment.

Dated: Honolulu, Hawaii, this 19th day of March, 1973.

/s/ MARTIN PENCE
United States District Judge

INSTRUCTIONS TO APPRAISERS

THE COURT:

* * *

The Court has appointed Eastman Dillon, Union Securities Company and Gilbert W. Root as officers of this Court in accordance with the stipulations heretofore entered and the Court's orders thereon. The instructions read as follows:

The purpose of this hearing is to appoint Eastman Dillon, Union Securities & Co. and Gilbert W. Root, as officers of this Court, to perform independent appraisals of the value of the capital stock of the Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. (which I shall hereinafter refer to as the "Plantations") in accordance with the settlement of this action and to instruct the Court's appraisers as to the scope of their duties and the manner in which they shall perform them.

"This action arose out of the mergers of the Plantations into Amfac, Inc. in January, 1969. The complaint alleged, among other things, that Dean Witter & Company, who had performed the original appraisals of the capital stock of the Plantations for the purpose of determining merger exchange ratios, had not performed the appraisals in an independent and impartial manner, thereby causing the minority shareholders of the Plantations to receive less than fair value for their Plantation stock.

"The settlement of this action provides that the value of the common stock of the Plantations shall be reappraised by an independent investment banker, who in light of the substantial real estate holdings and leaseholds of the Plantation companies, shall be assisted by an independent real estate appraiser. On the basis of your responses to the Court's communications to you dated January 4, 1972 and on the basis of additional information submitted by the parties at a Hearing held on February 14, 1972, the Court is satisfied that each of you will act impartially in this matter and hereby appoints you to appraise the value of a share

of the capital stock of each of the three Plantations as of January 1, 1969.

"In conducting these appraisals, you shall serve as officers of this Court under this Court's sole direction and supervision. Your fees will be paid to you by this Court. Accordingly, it is essential that your performance be independent and impartial both in fact and in appearance. I therefore instruct all parties, their counsel and all other persons subject to this Court's jurisdiction not to initiate any contact or communication with either of you for any reason without prior approval of this Court. If any person attempts, directly or indirectly, to initiate any contact or communication with you with respect to any aspect of these appraisals without approval of this Court, you are instructed to advise this Court immediately of that fact, and appropriate action shall be taken. On the other hand, you are authorized to request relevant factual information from any party or counsel, who shall respond to such request without further order of this Court. Moreover, you are authorized to approach this Court with respect to any question which may arise.

"Your duties are as follows:

"It is the duty of Eastman Dillon, as the investment banker, to appraise the value of a share of capital stock of each of the three Plantations as of January 1, 1969, in the manner ordinarily, customarily and usually recognized in your profession for the purpose of determining exchange ratios in merger situations. You shall consider all relevant value criteria which shall include but not necessarily be limited to market price, net asset value and investment value. In the consideration of net asset value you shall utilize the services of Gilbert W. Root, MAI, of Honolulu, Hawaii as real estate appraiser who, under your supervision, shall appraise the value of such of the real estate of each of the three Plantations as directed by you. In the consideration of market price, you should discount or exclude quotations and sales reflecting the expectation of

increased or decreased value as a result of the announcement of July 24, 1968 of the intention to merge the Plantations into Amfac, Inc.

"Mr. Root, it is your duty, as the real estate appraiser, to appraise the value of such of the real estate of each of the three Plantations as directed by Eastman Dillon for Eastman Dillon's use in the consideration of net asset value. Although you are to perform your appraisals under the direction of Eastman Dillon, you are to reach your own independent judgment as to the value of the real estate appraised and you are to perform your appraisals in the ordinary, customary and usual manner recognized by your profession.

"Both of you shall have complete access to all records and information in the custody or control of Amfac, Inc. as you may require in order to perform your appraisals. You also shall have access to the proxy statements issued by Amfac and the Plantations in connection with the mergers and any records filed with this Court in this action in the custody or control of any of the counsel for any of the parties herein.

"You shall have until September 6, 1972 to complete your appraisals and to prepare and submit a full report to the Court and to counsel for the parties with your determination of the fair value of a share of capital stock of each of the three Plantations expressed in a dollar amount. An extension of time within which to submit your report will be granted by the Court only upon good cause being shown.

"The parties will have fiftten (15) days from receipt of your report to submit written comments thereon which you may disregard or consider in your discretion. You will have fifteen (15) days from the expiration of said period within which to make any revisions to the report which you deem necessary or appropriate. Absent fraud, your final decision as to the determination of the fair value of a share of the capital stock of the Plantation companies will be final and binding upon the parties and nonappealable.

"I emphasize again that you are to perform your duties as officers of this Court under the sole direction and supervision of this Court. If you have any question at any time relating to your duties or to the performance thereof, you are instructed and encouraged to submit such question to the Court."

* * *

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IN THE

Supreme Court of the United States

JAN 23 1974
MICHAEL RODAK, JR., CLERK

October Term, 1973
No. 73-970

DERICKSEN M. BRINKERHOFF and the MEMBERS OF THE CLASS, *Petitioners,*

vs.

AMFAC, INC., *Respondent.*

Brief of Respondent, Amfac, Inc., in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Request of Amfac, Inc. for Damages.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-970

DERICKSEN M. BRINKERHOFF and the MEMBERS OF THE CLASS,

Petitioners,

vs.

AMFAC, INC.,

Respondent.

Brief of Respondent, Amfac, Inc., in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Request of Amfac, Inc. for Damages.

Respondent, Amfac, Inc., respectfully submits the following brief in opposition to the Petition of Dericksen M. Brinkerhoff and the members of the class for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and prays that said Petition forthwith be denied and that Respondent be awarded damages pursuant to the provisions of Rule 56(4) of the Revised Rules of this Court.

I.
Opinions Below.

The *per curiam* opinion of the Court of Appeals entered on September 13, 1973 [Petitioners' Appendix (hereinafter "Pet. App."), pp. A1-A2], is reported at 485 F.2d 1389 (9th Cir. 1973).

II.

Introduction.

The Petition for Writ of Certiorari seeks review of a summary affirmance by the United States Court of Appeals for the Ninth Circuit of a nonappealable decision of the United States District Court for the District of Hawaii, which held that the court-appointed and supervised appraisers had properly determined the exchange value of the capital stock of three Hawaiian sugar plantation companies. That petitioners seek such a review is a direct reflection on their lack of candor in light of their apparent deliberate omission of an express written stipulation that:

> "The appraisals, prepared by the investment banker shall be final, conclusive, and binding on the parties, *and no appeal or review shall lie therefrom.*" [Emphasis added] [XV C.T. 4802-4803].[1]

Respondent respectfully contends that the Court must hold petitioners to their agreement (under which they have received over $400,000 in fees and costs from respondent) by denying the Petition for Writ of Certiorari.

III.

Counterstatement of the Case.

A. The Circumstances Preceding and Surrounding the Execution of the Stipulation of Settlement Require Denial of the Petition.

This action arose out of the merger of the Lihue Plantation Co., Ltd. ("Lihue"), Puna Sugar Co., Ltd.

[1]All references to ".... C.T. ...." refer to the particular volume and page number of the Clerk's Transcript on Appeal. All references to "R.T. .... (date)" refer to particular portions of the Reporter's Transcript of the proceedings held before the District Court.

("Puna") and Kekaha Sugar Co., Ltd. ("Kekaha") (collectively referred to as "the Plantations") into respondent, Amfac, Inc. ("Amfac"), a publicly-owned corporation. Prior to the mergers, Amfac owned or controlled over 75% of the issued and outstanding stock of each of the Plantations and could have consummated the proposed mergers without proxy solicitations [XIII C.T. 4046]. Nevertheless, proxies were solicited and in October of 1968 each of the mergers were approved by an overwhelming vote of the Plantations' shareholders. The mergers were completed in January of 1969 with the exchange of Plantation shares for Amfac shares, the exchange ratios having been based upon appraisals performed by Dean Witter & Co.

On May 14, 1969, petitioners, and another entity which was abandoned this litigation, filed this class and derivative action alleging that because of undisclosed relationships between Dean Witter & Co. and Amfac, the Dean Witter & Co. appraisals prepared for the merger were improper, that improper and inaccurate representations had been made to the Plantation shareholders to induce approval of the mergers and that by such acts a fraud had been perpetrated upon the minority Plantation shareholders under various provisions of the Securities Exchange Act of 1934 [I C.T. 3]. Thereafter, petitioners' motion to maintain the action as a class and derivative action was granted [XI C.T. 3458]. *Northern Acceptance Trust 1065 v. Amfac, Inc.*, 51 F.R.D. 487 (D. Hawaii 1971).

On May 5, 1971, petitioners' motion for partial summary judgment, as to liability only under Section 10(b) of the Securities Exchange Act of 1934, was granted as to certain defendants [XIV C.T. 4338; R.T. 5-8

(May 5, 1971].[2] On May 17, 1971, the District Court denied defendants' motion for certification of an interlocutory appeal from its decision [R.T. 26-27 (May 17, 1971)], leaving respondent the right to appeal after trial of the case.[3]

On August 2, 1971, following arduous and extensive settlement negotiations between counsel for petitioners and counsel for Amfac, a Stipulation of Settlement ("Stipulation") was drafted and lodged [XV C.T. 4799] together with a motion for approval of same [XV C.T. 4794]. A copy of that Stipulation is attached hereto as Appendix pages 1-8.

The terms of the Stipulation provided that there would be a reappraisal of the exchange value of the shares of minority stock of each of the three plantations as of the date of the mergers. This reappraisal was to be conducted by independent experts to be appointed by and under the supervision of the Court. The cost of the reappraisal was to be (and was) paid by

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[2]Petitioners imply on page 4 of their petition that by granting summary judgment on the issue of liability, the District Court found as a matter of law that at least some undervaluation had occurred. In fact, the Court did *not* so hold, and the suggestion that undervaluation had been demonstrated is totally without foundation.

[3]Defendants' opposition to the motion for summary judgment raised serious and substantial questions which subsequently caused the District Court to state:

> "Although summary judgment was granted to plaintiffs under Section 10(b) of the 1934 Act, the outcome of an appeal on liability is uncertain since Amfac controlled all three plantations and could have consummated the mergers without the vote of a single minority shareholder." [XVII C.T. 5297 (footnote)].

Amfac. If, as a result of the reappraisal, it was found that the values attributed to the stock in any of the plantations was greater than the value of the Amfac stock received in exchange for the plantation stock, Amfac would be required to pay into Court for the benefit of the minority stockholders the excess of the values determined by the reappraisal—eighty percent in common stock of Amfac and twenty percent in cash.

Paragraph 6 of the Stipulation was of particular importance and provided:

> "Within 15 days after the filing and service of the original appraisals, any of the parties may serve on the investment banker and file with the Court and serve upon opposing counsel written comments relating thereto; *provided, however, that such written comments shall be advisory only and the investment banker may adopt or reject any such written comments, in whole or in part, or give such other effect to such comments, as it may deem advisable.*" [App., p. 3]. [Emphasis added].

Paragraph 7 of the Stipulation went on to provide that if comments were served and filed, the appraisals would become final 30 days after they were filed, but if no comments were filed, the appraisals would become final fifteen days after they had been filed. Notwithstanding the provision for comments, however, the Stipulation went on in Paragraph 7 specifically to state that:

> "The appraisals prepared by the investment banker shall be final, conclusive, and binding on the parties, and *no appeal or review shall lie therefrom.*" [Emphasis added] [App., p. 3].

This last clause was the foundation of the settlement, yet petitioners have consistently ignored it, to the extent that they entirely fail to note its existence in their instant petition.

B. Petitioners Have Inexcusably Failed to Disclose the Final and Nonappealable Nature of the Appraisals Made Pursuant to the Stipulation of Settlement.

The gravamen of the complaint in this action was whether the exchange ratios used by Amfac in effectuating the merger of the three plantations were arrived at as a result of work done by "independent" appraisers. The Stipulation of Settlement thus assured petitioners of complete relief by providing for the appointment by the Court of an independent investment banker, approved by both parties, which was to perform its duties as an officer of the Court under the sole direction and supervision of the Court. [Pet. App., A28]. Recognizing, however, that even when appraisals are performed by an independent, court appointed appraiser, the parties might have useful insight to shed on the subject, the Stipulation provided for a comment procedure [paragraph 6, quoted above] and further specifically stated that whether or not comments were filed, "the appraisals . . . shall be final, conclusive, and binding on the parties, and no appeal or review shall lie therefrom." [App., p. 3].

Pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, notice of the proposed settlement was mailed to each member of the class. That notice clearly described the final and nonappealable nature of the appraisals to be performed under the Stipulation, and based upon that representation, the majority of the class opted for the settlement. Furthermore, peti-

tioners and their counsel consistently emphasized to the Court the importance of the finality of the appraisals.[4]

On November 15, 1971, the Court entered its Opinion and Order finding the proposed settlement to be fair, adequate and reasonable [XVII C.T. 5290]. Notably, Petitioners' Memorandum in Support of Proposed Settlement glowingly described the settlement as follows:

> "The proposed settlement also eliminates the risk to plaintiffs which continuing this litigation would necessarily entail. In the absence of a settlement, expensive and time-consuming appeals on the merits would be inevitable. It is impossible to predict with certainty the ultimate disposition of this case upon appeal. Thus, the members of the classes would face the risks of reversal on liability, on damages or on both. *The proposed settlement provides that the appraisals shall be final, conclusive and binding on the parties, and no appeal or review will lie therefrom.*
>
> Hence, the proposed settlement *guarantees* for the classes that which prosecution to final judgment could not, i.e., an independent appraisal of the valuation of the plantation shares they surrendered, recovery of the difference between that and what they in fact received, *and no appeals.*" [XVI C.T. 5144-5145] [Emphasis added].

On November 22, 1971, an Order was entered dismissing the action with prejudice as to all defendants,

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[4]See, *e.g.*, XVI C.T. 5005; XVI C.T. 5144-5145; R.T. 69-70 (September 17, 1971); R.T. 75 (September 17, 1971); R.T. 76-77 (September 17, 1971); R.T. 78 (September 17, 1971); XVII C.T. 5296-5297 [Court's Opinion and Order of November 15, 1971, based upon language of petitioner; see R.T. 108 (September 17, 1971)].

reserving jurisdiction only to implement, supervise and enforce the terms of the Stipulation [XVII C.T. 5317].

Shockingly, petitioners have failed to advise this Court of the final and nonappealable nature of the appraisals performed pursuant to the Stipulation. The reason for such an omission is obvious—petitioners accepted and retained over $400,000 in costs and fees paid to them by Amfac in reliance upon the finality of the Stipulation and the resultant appraisals and thereafter disavowed their Court approved Stipulation and prosecuted the appeal giving rise to the Petition for Certiorari now before this Court. For this Court to accept petitioners' artful and incomplete argument and grant a review would result in a grave miscarriage of justice.

C. Petitioners Have Intentionally Misinterpreted and Selectively Quoted From the Instructions Given to the Appraisers Pursuant to the Stipulation of Settlement.

With the prior consent of petitioners and Amfac, the Court appointed Eastman Dillon, Union Securities & Co. ("Eastman Dillon") as the independent appraiser responsible for the appraisals required by the Stipulation. The Court similarly appointed Gilbert W. Root ("Root"), an experienced appraiser of Hawaii real estate, to assist in the determination of realty value. As required by the Stipulation, the Court orally instructed the appraisers in terms jointly drafted by petitioners and Amfac. Because of petitioners' conduct in prosecuting the appeal giving rise to the petition now before this Court, petitioners understandably have played down all aspects of the instructions which relate to the independence of the appraisers and the finality of their appraisals.

For instance, though repeatedly stating their position that the appraisers failed to follow the instructions, which instructions according to petitioners set forth a "mandatory" method of appraisal, petitioners have made no reference at all to that portion of the instructions (and the Stipulation upon which said instructions were based) which permitted the parties to submit comments on the appraisals. Petitioners utterly ignore the fact that the appraisers *were not required to adopt the comments of either party,* but rather were instructed:

> "*You may disregard or consider* [*such comments*] *in your discretion.* You will have fifteen (15) days from the expiration of said period within which to make any revisions to the report which *you* deem necessary or appropriate. *Absent fraud, your final decision as to the determination of the fair value of a share of the capital stock of the Plantation companies will be final and binding upon the parties and nonappealable.*" [Pet. App., p. A27]. [Emphasis added].

This provision, particularly when read with the portion of the instructions directing the appraiser to approve the value of the Plantation stock "in the manner ordinarily, customarily and usually recognized in your profession" [Pet. App., p. A27] is inconsistent with the highly restrictive and unsupportable interpretation of the appraiser's function which petitioners would urge as being mandated by the instructions.

The second major omission in petitioners' analysis of the instructions appears on page 6 of the petition where, when describing the appraisers' duties, petitioners state that "their [the appraiser] determination

of the value of the capital stock of each of the Plantations was to be final and binding." The extent to which petitioners have been less than forthright in that statement is highlighted by again quoting in full the following portion of the instructions given to the appraisers:

> "*Absent fraud* your final decision as to the value of the capital stock of the Plantation Companies will be final and binding upon the parties *and nonappealable.*"

The omitted words point up the inconsistency between the clear intent of the instructions and the restrictive interpretation advanced by petitioners. Moreover, it is the critical point which distinguishes the instant case from *Marceron v. Chevy Chase Service, Inc.*, 258 F.2d 255 (D.C. Cir. 1958), on which petitioners base their argument that there is a split in the circuits. See discussion, *infra*, at pages 18-20.

Petitioners' third major misinterpretation of the instructions to the appraisers relates both to the function to be played by Gilbert Root in the determination of fair exchange value and to the importance of the concept of "net asset value". Petitioners have seized upon their definition of net asset value as "a theoretical liquidation value" to support their argument that:

> "all parties were in agreement that Root was *required* to appraise the theoretical liquidation value of the substantial real estate holdings, Eastman Dillon was *required* to appraise the theoretical liquidation value of the non-real estate assets and Eastman Dillon was *required* to consider and give some weight to the theoretical liquidation value of *all assets* in fixing the fair value of the Plantation stock." (Petition, p. 9) [Emphasis added].

Petitioners argue from this misrepresentation that Eastman Dillon "never appraised the theoretical liquidation value of real estate employed in the Plantations' sugar operations . . . and, therefore, could not and did not include any amount for the liquidation value of said real estate and other assets in its appraisal of the Plantation stock." (Petition, p. 10).

This argument finds no support in the instructions to the appraisers to "consider" all relevant value criteria. Petitioners' distortion is highlighted in footnote 9 (p. 10) to the Petition, where the following statement is found:

> "Petitioners vigorously assert, however, that under the Stipulation of Settlement and the jointly drafted instructions, Eastman Dillon *was required to include* the 'net asset value', i.e. the liquidation value, of all of the Plantations' assets, including the real estate and other assets employed in sugar operations as one of the essential criteria of the value of the Plantations' stock." [Emphasis added].

The word "include", of course, is not found in the instructions, which require only that certain aspects must be "considered". Petitioners' substitution of "include" for "consider" is but one further example of their material distortion of the instructions in an attempt to convince the Court to grant a review when all rights to review and appeal have been specifically waived.

Even if, as contended by petitioners, Eastman Dillon were required to make a net asset or liquidation valuation, Eastman Dillon was not required to give such a valuation any particular weight. Such was the express holding of the Delaware Supreme Court in *Sterling v.*

Mayflower Hotel Corp., 93 A.2d 107, 111-116 (Sup. Ct.Del. 1952). For all practical purposes, the *Sterling* case involved issues of fact and law identical to those in the present case.

D. Petitioners Have Inaccurately Characterized the Effect of the Decisions of the Courts Below.

Petitioners repeatedly argue that the effect of the decisions of the District Court and the Court of Appeals, if not reversed, would be to permit a party found guilty of securities law fraud to retain the multi-million dollar bounty of its fraud. Two points must be made with respect to that argument. First, the thrust of Judge Tavares' ruling on summary judgment was that the proxy statements issued by Amfac did not adequately disclose the relationship between Amfac and Dean Witter and, that as a result of that relationship, Dean Witter was not an "independent" appraiser. The summary judgment did not determine that the Dean Witter exchange ratios themselves were improper or that Amfac received any windfall whatsoever as a result of the mergers. An understanding of the basis of the ruling on the summary judgment motion is crucial to an understanding of the Stipulation of Settlement and the Instructions to the appraisers, particularly with respect to the provision therein relating to the finality of the appraisals "absent fraud". The principal purpose of the settlement was to insure the independence of the appraisers, and at no time have petitioners raised any question as to the independence of either Eastman Dillon or Root.

Second, it is difficult to understand how, if Amfac received a windfall from the merger, petitioners would not have received a similar windfall. The value of the Amfac stock given in exchange for plantation stock was

limited to the average resale price of Amfac stock on the New York Stock Exchange during a specified period. If we are to accept petitioners' views that the plantations were worth untold millions more than the appraised value, than the Amfac shares given in exchange for the Plantation shares should be given a greater pro rata value because, at the time of the merger, Amfac owned most of the shares of the three plantations. Similarly, petitioners ignore the fact that this was not a merger for cash but rather by way of exchange of shares. If, in fact, Amfac received a bargain, petitioners received the same bargain and will share pro rata in the benefits, since they now hold Amfac stock.

E. The Circumstances Surrounding the District Court Hearing and Determination of Petitioners' Challenge to the Validity of the Appraisals Require Denial of the Petition.

On October 5, 1972, the appraisers filed their appraisals. Those appraisals determined that the exchange values found by Dean Witter in the original merger transaction were proper and, in fact, were higher than the values found by the court's appraisers. On October 24, 1972, petitioners filed 47 pages of comments analyzing the Eastman Dillon appraisals. Thereafter, on November 17, 1972, Eastman Dillon acknowledged receipt of the comments and increased its appraisals on two of the three plantations. Even with the increased valuations, however, Eastman Dillon concluded that the original exchange of Amfac stock had not only given fair value, but a higher value, to the minority shareholders of the Plantations.

On November 3, 1972, two weeks *before* the November 17, 1972 letter to the Court from the appraisers

after review of petitioners' comments, petitioners filed a Motion to Set Aside Appraisals on the grounds, *inter alia*, that they were "fraudulent", and proceeded to summarize fourteen alleged items in support thereof [XIX C.T. 5887], all of which had been thoroughly presented in petitioners' 47 pages of comments filed on October 24, 1972. Neither the comments, nor any of the items set forth in petitioners' motion, nor any other documents submitted by petitioners since the signing of the Stipulation of Settlement, have asserted facts, which, if true, would constitute fraud. Rather, petitioners have instead repeatedly thrust upon the Court their view of the manner in which Eastman Dillon should approach problems of evaluation, so that the values established by the appraisals would be substantially increased. Although petitioners have repeatedly used words such as "fraudulent", never have petitioners even attempted to spell out anything akin to fraud, or to collusion which might be equated to fraud. Petitioners have blithely ignored the Stipulation and the retention of very substantial monies, and have asserted, and continue to assert in their Petition to this Court, a right to appeal which right was expressly waived by the provisions of the Stipulation that provide that the judgment of the appraisers would be final and not appealable.

Over respondent's strenuous objections, a hearing was set on the motion to set aside the appraisals. After extensive examination and cross-examination of the appraisers covering a three-day period in December of 1972, and after complete legal briefing and argument, on March 19, 1973, the Court made and entered its Decision on Challenge to the Validity of Eastman Dillon's Appraisals, in which it denied all motions to

set aside the appraisals and directed that said appraisals take effect under the terms of the previously approved settlement agreement. [Pet. App., pp. A4-A24]. It must be kept in mind that at every available opportunity prior to the hearing before the District Court, particularly during the period prior to the time that Judge Pence indicated he would hold a hearing with respect to the validity of the appraisals, petitioners made repeated charges and allegations that those appraisals were fraudulent. As they well knew, no less a charge than fraud would induce the Court to order any hearing and it was only because of such charge that a hearing, in fact, was held. When the hearing took place, however, petitioners submitted no evidence of fraud nor did they allege a single fact which, if true, would have tended to establish fraud. By the time of the hearing itself, petitioners had conceded that they could not show "venal" fraud, and specifically so stated in their closing argument when their counsel said:

> "We have not offered evidence nor are we asserting at this time that either Mr. Root or Eastman Dillon is guilty of the type of venal fraud which Your Honor has mentioned. We believe that they are wrong. We believe that they did not follow the instructions. We believe that they have not complied with the order of this Court. We believe they have not done their job and they are not entitled to have the product approved by this Court, but we are not saying that they have been guilty of venal fraud." [R.T. 449-450 (Dec. 6, 1972)].

Having bootstrapped themselves into a hearing, petitioners then contended before the District Court, and

again contended on appeal (and now petition for review based upon the identical contention) that merely because the appraisers testified that they had received certain information from Amfac, it was error not to permit petitioners to examine Amfac's officers to test the truth of that information. Petitioners disregard the fact that the instructions to the appraisers were that they "shall have complete access to all records and information in the custody and control of Amfac, Inc. as . . . [they] may require to perform [their] appraisals."

Thus, the very information gathering process ordered by the Court has become the basis of petitioners' argument that it was error not to permit petitioners to engage in (using the words of the trial court) a "fishing expedition" for fraud, even though they had not made one single factual allegation of fraud of any kind.

The apparent motivation for petitioners' acts following their filing of the Eastman Dillon appraisal, including their petition to this Court, may be found in the terms of the Stipulation, which provide that not only would Amfac pay the appraisal costs, but also, if it were found that the value attributed to the stock of any of the plantations was greater than the value of the Amfac stock received in exchange, then Amfac would be required to pay into Court the excess of the values determined by the appraisals—80% of such in excess to be in stock of Amfac and 20% in cash [App., pp. 4-5]. This provision was obviously a gambit by petitioners' counsel, since the Stipulation went on to provide in paragraph 13 thereof that Amfac was not to object to any fee application by counsel for petitioners which did not exceed the 20% cash fund which would be so created [App., pp. 4-5]. Clearly, the im-

petus for the appeal to the Ninth Circuit and for the petition to this Court was created when the Eastman Dillon appraisals revealed that the original Dean Witter valuations were on the generous side and that there would be no funds available for additional attorneys' fees.

IV.

Argument.

A. This Is Not a Proper Case for the Granting of Certiorari.

The considerations governing the grant or denial of a Writ of Certiorari are specified in Rule 19 of the Revised Rules of the Supreme Court of the United States and were summarized by Mr. Justice Harlan in his dissenting opinion in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 478-479, 88 S.Ct. 2186, 2223, 20 L.Ed. 2d 1189 (1968), where he stated:

> "[C]ertiorari jurisdiction was not conferred upon this Court 'merely to give the defeated party in the . . . Court of Appeals another hearing,' *Magnum Import Co. vs. Coty*, 262 U.S. 159, 163, 43 S.Ct. 531, 532, 67 L.Ed. 922, or 'for the benefit of the particular litigants,' *Rice vs. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, but to decide issues, 'the settlement of which is of importance to the public as distinguished from . . . the parties,' *Layne & Bowler Corp. vs. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712."

Additionally, certiorari should be granted "where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals," *Layne & Bowler Corp. v. Western Well Works, Inc.*,

261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712 (1922), or where the petition raises a federal question of substance. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L. Ed. 897 (1955). As Mr. Justice Frankfurter stated in *Rice:*

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Respondent respectfully submits that the Petition for Certiorari meets none of the requirements set forth in Revised Rule 19 for the granting of certiorari. The contention that there is a conflict between the circuits is demonstrably transparent and without merit. Similarly, the questions presented, even if they were not based upon misstatements of the record, are not important questions of federal law which require adjudication by this Court.

B. The Alleged Conflict Between the Circuit Courts of Appeals Is Illusory.

The primary ground for petitioners' prayer that a Writ of Certiorari issue is that the decision of the Court of Appeals for the Ninth Circuit in this case is in conflict with the decision of the District of Columbia Circuit in *Marceron v. Chevy Chase Services, Inc.*, 258 F.2d 157 (D.C.Cir. 1958). In fact, the alleged conflict is illusory.

It is true that in *Marceron*, the Court of Appeals reviewed the appraisers' interpretation of their instructions. It is important, however, to focus on the precise language used by the Court in permitting such a review. As quoted on page 21 of the Petition, now Chief Justice Burger declared:

> "Thus it appears that the appraisers' construction of the formulae can properly be reviewed by the trial court *and* by us." [Emphasis added] [258 F.2d at 158].

"Can" is not "shall" or "must" and therefore the review by the trial and appellate courts in *Marceron* was discretionary, even under the facts of that case. At the very most, therefore, *Marceron* indicates that a Court of Appeals may, under certain circumstances, exercise its discretion to review the manner in which appraisers or arbitrators have performed their duties. Those circumstances are where the parties have not granted the power to make final and binding decisions in the appraisers.

In *Marceron*, the Court said:

> "In effect, arbitrators are private judges whose powers are defined by contract. . . .
>
> Here we are dealing with appraisers appointed solely to appraise value of real estate and its rental value. To be sure, they had to make a preliminary or tentative interpretation of their instructions and powers as defined in the leases. But that does not carry with it power to do so with finality. The parties *could* have vested such final authority in third persons, but it is not to be implied from a grant of authority to appraise value." 258 F.2d at 158.

Of course, in the present case, it is manifest from the Stipulation that the "final authority" referred to in *Marceron* was vested in Eastman Dillon. Paragraph 6 of the Stipulation for instance, specifically provided that, after the appraisers had submitted their reports, the parties could submit comments to the appraisers with respect to the reports, but provided further that ". . . such written comments shall be *advisory only* and the investment banker may adopt *or reject* any such written comments, in whole or in part, or give such other effect to such written comments, as it may deem advisable." [Emphasis added] [App., p. 3]. The power vested in the appraisers to accept or reject any comments on the appraisals necessarily includes the power to accept or reject comments with respect to the manner in which the appraisals were performed, since in this instance, technique and conclusions are inseparable. This is consistent with paragraph 7 of the Stipulation which expressly provided that "the appraisals prepared by the investment banker shall be final, conclusive and binding on the parties and no appeal or review shall lie therefrom." [App., p. 3].

Had no such authority been vested in the appraisers in this case, the underlying question to be answered by this Court, if certiorari were to be granted, would be whether the Court of Appeals properly exercised its discretion *not* to review the findings of the District Court with respect to the appraisals. Of course, this Court should not be asked to utilize its certiorari power to review an exercise of discretion except under the most unusual circumstances. As has already been demonstrated, such circumstances do not exist in this case and the decision of the District of Columbia Circuit in

the *Marceron* case is consonant with the decision of the Court of Appeals below.

C. The Petition for Certiorari Raises No Question of Federal Law of Sufficient Importance to Require a Decision by This Court.

Petitioners, by hyperbole, have sought to make it appear that policy questions relating to the implementation of the Securities Exchange Act of 1934 are at issue here. Nothing could be further from the truth. The only issue here is the implementation of a written settlement agreement. In their attempt to elevate the issues in this case to Supreme Court level, petitioners have sought to equate a settlement with a finding against respondent on the merits. Specifically, petitioners assert at page 19 of their Petition:

> "Just as the 1934 Act itself must be broadly and liberally construed in a manner which effectuates its remedial purposes, so too proceedings to implement a settlement after a party has been found guilty of federal securities law fraud must give effect to the remedial purpose of compelling the wrongdoer to disgorge his illegal gains."

Petitioners' statement quoted above ignores two vital issues. First, in the context of implementing a settlement agreement, the fact that a summary judgment as to liability has been granted is immaterial, particularly where the summary judgment was predicated only on an issue of disclosure and did not determine, in any manner whatsoever, that Amfac had obtained any monetary advantage. Secondly, in the context of implement-

ing a settlement agreement, as opposed to fashioning a remedy as was true in *J. I. Case Co. v. Borak,* 377 U.S. 426 (1964), the remedial purposes of the act are immaterial. In a settlement agreement, it is assumed that the parties are attempting to remedy any wrong that may have occurred by contract and the Court should not (and, indeed, may not) alter the agreement of one of the parties to such a contract without altering the agreement of all parties.

What petitioners' argument implies is that once a party has suffered an adverse decision on a question of liability under the Securities law, all questions arising with respect to the implementation of a subsequent settlement agreement should be resolved against that party in order to effectuate the remedial purposes of the Securities Exchange Act. Contrary to petitioners' argument, nothing could be more destructive to the possibilities of settlement actions than the acceptance of this proposition. For example, a serious question existed in this case as to whether Judge Tavares' finding of liability could withstand an appeal to the Court of Appeals in view of Amfac's overwhelming majority position in each of the plantations [See footnote 3, *supra*]. This was recognized by petitioners' counsel at the time the settlement agreement was submitted to the Court for approval [R.T. 68-69 (Sept. 17, 1971)]. When petitioners bargained away their rights to a jury trial on the issue of damages (as alleged at p. 19 of the Petition), Amfac and the other defendants bargained away their right to appeal from the determination of the District Court upon the summary judgment, which decision both petitioners and the Judge conceded was subject to serious question. No party would bargain away such a right if petitioners' present

position were adopted; indeed, such adoption would discourage settlement of securities actions and force them back into the Courts. Here, Amfac gave up its right to appeal from the summary judgment, gave up *its* right to three separate jury trials on the issue of damages as to each plantation, agreed to abide by the decision of a Court-appointed and supervised appraiser as to the issue of damages, agreed that if the Court-supervised appraisal showed that petitioners had been damaged to pay into Court *the full amount of such damage,* waived its right to appeal from the determination by the Court-appointed appraisers, and, in addition, paid to petitioners a sum of money in excess of $400,000 as and for their attorneys' fees and costs. In exchange for this, petitioners were merely asked to similarly waive their right to a jury trial on damages and to waive their right to appeal from the determination of the Court-appointed appraisers. In effect, Amfac agreed to give to petitioners everything that they could possibly recover under a jury trial in exchange for the waiver of the right to such jury trial and the waiver of right to appeal. Petitioners, with full knowledge of every detail of such an agreement, entered into the Stipulation of Settlement and when the decision of the Court-appointed appraisers showed that petitioners were not entitled to any damages and had not been damaged by the merger, petitioners sought to overturn the Stipulation and still continue in that effort by their Petition to this Court. Clearly, a review of the facts in this case leads to the inescapable conclusion that no issue of constitutional or federal significance is presented and that no issue worthy of review by this Court has been raised by petitioners.

V.

Amfac's Request for Damages.

When petitioners, in disregard of their express waiver of all right to review or appeal from the decision of the District Court approving the valuations determined by the Court-supervised appraisers, filed their appeal to the Ninth Circuit, despite the fact that they accepted and now retain over $400,000 in attorneys' fees and costs paid by Amfac in reliance upon the waiver, Amfac moved to dismiss the appeal and for an award of sanctions. A copy of that motion is incorporated in the Appendix hereto as pages 8 through 40. By the ruse of seeking expeditious disposition of the appeal, petitioners immediately filed their opening brief and moved to expedite the appeal before the Ninth Circuit could rule on the motions to dismiss and for sanctions. As a result, the appeal was expedited, all documentation was considered simultaneously, the motions were denied and the decision of the District Court was summarily affirmed [Pet. App., pp. A1-A2].

Respondent respectfully urges that petitioners' conduct as summarized above, and as is set forth in detail in the copy of the motions appended hereto [App., pp. 8-40], clearly shows that there is no ground for the granting of the Petition for Writ of Certiorari filed herein and fully justifies an award of reasonable damages, including but not limited to the cost of printing this brief in opposition, as is provided in Rule 56(4) of the Revised Rules of this Court. It need only be

pointed out that in *Whitney v. Cook*, 99 U.S. 607, 25 L.Ed. 446 (1879), this Court said:

> "Our experience teaches us that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this Court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

Similarly, this Court has frequently said that "where a writ of error or appeal is dismissed because the alleged ground therefor is so unsubstantial as to be frivolous, a penalty may be imposed." *Salker v. O'Connor*, 278 U.S. 188, 190, 49 S.Ct. 158, 159, 73 L.Ed. 258 (1929); *Roe v. Kansas*, 278 U.S. 191, 193, 49 S.Ct. 160, 160-161, 73 L.Ed. 261 (1929); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 233-234, 43 S.Ct. 589, 592, 67 L.Ed. 961 (1923); *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 109, 33 S.Ct. 80, 83, 57 L.Ed. 140 (1912).

Respondent respectfully submits that in light of the foregoing authorities an award of damages is fully justified in this case.

VI.

Conclusion.

Respondent respectfully submits that petitioners have failed to show any ground sufficient to justify this Court exercising its certiorari jurisdiction. In essence, the Petition asks this Court to review a judgment of the United States District Court for the District of Hawaii which stated that certain Court-supervised appraisals "are found to be neither fraudulent nor erroneous, and are approved" [XX C.T. 6240]. It is elemental, that even if the question were of such magnitude to justify the attention of this Court, petitioners have failed to carry their burden of demonstrating the error of that decision.

As has been repeatedly set forth, the only basis upon which the trial court could have set aside the Court-supervised appraisals was if they were tainted by fraud or collusion—that is, if they were the product of venality. Petitioners, however, have specifically acknowledged that they have not demonstrated fraud or collusion. Their only suggestion, made totally without supporting facts, is that there may have been "constructive" fraud of an indeterminate nature. Clearly, this is insufficient to sustain petitioners' burden of showing error in the trial court's finding (as summarily affirmed by the Ninth Circuit) that the Court-supervised appraisers acted properly and that the appraisals were not fraudulent.

What this Petition really reduces to is an unsupported charge that the values found by the Court-supervised appraisers should have been higher. But petitioners waived the right to litigate this question when they agreed to settle the underlying action, to bring in independent Court-supervised appraisers and to waive all

rights of review or appeal from the values found by those appraisers. To now permit petitioners to upset their stipulation by making irresponsible charges which are totally unsubstantiated would be a gross miscarriage of justice. Tricks of advocacy should not be countenanced to lend apparent substance to a frivolous and vexatious appeal. *Griffin Wellpoint Corp. v. Munro-Langstroth, Inc.*, 269 F.2d 64, 67-68 (1st Cir. 1959).

So that respondent will not be chided for using injudicious language, we quote from the oral argument of Bruce W. Kauffman, Esq., petitioners' lead counsel, presented to Judge Tavares in this action on August 18, 1972, changing only the name of "Handy" (petitioners' co-plaintiff, now dismissed from this action) to "petitioners". Mr. Kauffman's statements represent respondent's position with respect to the filing of the appeal to the Ninth Circuit and with respect to the filing of the Petition herein.

> "He [petitioners] was present in court on March 6th and observed the appointment of the appraisers by the Court, personally listened to the directions by this Court to the appraisers, was personally aware of the fact that this Court retained the right to reject any appraisal report which was tainted by fraud or by other irregularity such as fraud."
>
> "Nevertheless' . . . [petitioners] has made no effort to bring to the attention of this Court any evidence of any kind relating to fraud or irregularity and, Your Honor, I think that it's perfectly clear that the reason for that is that there is no such evidence; the charges were without basis, irresponsible and malicious, and brought only for

the purpose of harassing the independent appraisers, harassing counsel, and continuing the barrage of activity which unconscionably has increased the amount of time which counsel has had to devote to this case, the amount of time which this Court and the Ninth Circuit has had to devote to this case and the amount of exenses—out of pocket disbursements which have had to be incurred in this case." [R.T. 4-5 (Aug. 18, 1972)].

In light of the foregoing, respondent respectfully prays that the Petition for Writ of Certiorari be denied and that respondent be awarded its damages suffered by way of this frivolous Petition.

Respectfully submitted,

MARTIN GENDEL, Esq.,
GENDEL, RASKOFF, SHAPIRO & QUITTNER,
Attorneys for Respondent, Amfac, Inc.

Of Counsel:

CADES, SCHUTTE, FLEMING & WRIGHT,
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GENDEL, RASKOFF, SHAPIRO & QUITTNER,
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6380 Wilshire Boulevard,
Los Angeles, Calif. 90048.

APPENDIX.

Stipulation of Settlement.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

NORTHERN ACCEPTANCE TRUST 1065, by ROGER JON DIAMOND, Co-Trustee, et al.,	)	
Plaintiffs,	)	Civil Action
vs.	)	No. 70-3107
AMFAC, INC., et al.,	)	
Defendants.	)	

Plaintiffs, by their Attorneys, DILWORTH, PAXSON, KALISH, LEVY & COLEMAN, and PADGETT, GREELEY, MARUMOTO & AKINAKA, and Defendants AMFAC, INC., THE LIHUE PLANTATION CO., LTD., PUNA SUGAR CO., LTD., KEKAHA SUGAR CO., LTD., THE LIHUE PLANTATION CO., LTD., a wholly-owned subsidiary of Amfac, Inc., PUNA SUGAR CO., LTD., a wholly-owned subsidiary of Amfac, Inc., KEKAHA SUGAR CO., LTD., a wholly-owned subsidiary of Amfac, Inc., WAIMEA SUGAR CO., LTD., H. A. WALKER, JR., K. H. BERG, J. RUSSELL CADES, H. C. EICHELBERGER, C. HUTTON SMITH, J. E. EDNIE, R. A. VAN ORSDEL, JR., M. A. PIETSCHMAN, THOMAS BOWMAN, WILLIAM K. DONNELLY, J. E. LOOMIS, W. A. KRUSE, W. J. BALDWIN, D. T. SILVER, WILLIAM H. BOMKE, H. LESLIE HOFFMAN, RALPH E. PHILLIPS, FRED H. MERRILL, KENNETH F. BROWN, LEROY C. BUSH, GILBERT E. COX, C. DAGGETT HARVEY, JOHN C. WALKER, RALPH T. YAMAGUCHI, S. W. WILCOX, F. W. BROADBENT, G. W. FISHER, SR., JOHN PATTERSON, HERBERT C. SHIPMAN, L. A. FAYE, JO L. FULLER, R. GREGG ANDERSON and FIREMAN'S FUND AMERICAN INSUR-

ANCE COMPANIES, by their Attorneys, CADES SCHUTTE FLEMING & WRIGHT, hereby stipulate and agree as follows:

INTRODUCTION:

1. Plaintiffs and the above-named defendants (such plaintiffs and the defendants above-named sometimes hereinafter called "the parties") shall compromise and settle the above-captioned action amicably, upon the terms and subject to the conditions set forth below, pursuant to the provisions of Rules 23 and 23.1, Federal Rules of Civil Procedure, in such a manner to be binding upon the parties in accordance with said Rules and in full and final discharge of all claims and matters which have been asserted or might have been raised in connection with the matters involved, directly or indirectly, in this action.

PART A
CLASS ACTION SETTLEMENT AGREEMENT

2. Merrill Lynch, Pierce, Fenner & Smith, Inc. (hereinafter called the "investment banker") shall be appointed by the Court to appraise the value, as of January 1, 1969, of the capital stock of The Lihue Plantation Company, Limited, Puna Sugar Company, Limited and Kekaha Sugar Company, Limited (hereinafter called the "plantation companies"). The investment banker shall act as an officer of the Court under the Court's sole direction and supervision as hereinafter set forth.

3. Amfac hereby agrees that the investment banker shall have complete access to all records in the custody or control of Amfac which relate or refer in any way whatsoever to the plantation companies.

4. The Court shall issue instructions to the investment banker in substantially the form attached hereto as Exhibit "A".

5. The investment banker shall file with the Court, and serve upon counsel for the parties, its appraisals ("original appraisals") no later than six months after its appointment. An extension of time for the filing and serving of said original appraisals shall be granted only by the Court and only for good cause.

6. Within 15 days after the filing and service of the original appraisals, any of the parties may serve on the investment banker and file with the Court and serve upon opposing counsel written comments relating thereto; provided, however, that such written comments shall be advisory only and the investment banker may adopt or reject any such written comments, in whole or in part, or give such other effect to such written comments, as it may deem advisable.

7. In the event that no written comments are filed with the Court and served upon the investment banker and opposing counsel, such original appraisals shall become final 15 days after their filing and service. In the event that written comments are filed with the Court and served upon the investment banker and opposing counsel, such original appraisals, or modified appraisals, if any, shall become final 30 days after the filing and service of the original appraisals, unless such time is extended by an order of the Court at the request of the investment banker. The appraisals prepared by the investment banker shall be final, conclusive, and binding on the parties, and no appeal or review shall lie therefrom.

8. Amfac shall pay into, for disbursement by, the Court such fees and disbursements as the Court may

award for the appraisals prepared by the investment banker.

9. If the value as determined by the investment banker of a share of stock of any of the plantation companies involved in the action (hereinafter called the "plantation stock") shall exceed the value which is the product of the applicable exchange ratio in connection with the mergers of the plantation companies into Amfac or subsidiaries of Amfac, multiplied by the value of the shares of Amfac stock for which the particular plantation stock was to be and was exchanged in said mergers (the value of a share of Amfac stock to be the average closing price of a share of Amfac common stock on the New York Stock Exchange during January, 1969, with the value of a share of Amfac convertible preferred stock involved in said mergers deemed to be the value, as so determined, of the shares of Amfac common stock into which such share of preferred stock was convertible), Amfac shall pay into Court with respect to the particular plantation stock, within 14 days after the original appraisals prepared by the investment banker become final, 80% of the aggregate excess with respect to all shares of that particular plantation stock held of record on October 31, 1968 by the members of the class in this action who have not excluded themselves from the class by virtue of Rule 23, Federal Rules of Civil Procedure, in shares of Amfac common stock, the attributed value of each of which shares to be the closing price of a share of Amfac common stock on the New

York Stock Exchange on the trading day immediately preceding the date of payment of said shares into Court, plus the dividends which otherwise would have been payable on said shares from the effective dates of said mergers, and the remaining 20% of said aggregate excess in cash.

10. If the value as determined by the investment banker of a share of a particular plantation stock shall be lower than the value equal to the applicable product as provided in paragraph 9 of Part A hereof, Amfac shall pay nothing into Court with respect to that particular plantation stock and neither plaintiffs nor any other class members shall have any obligation to reimburse Amfac in any amount with respect to that or any other plantation stock.

11. Amfac shall pay to counsel for plaintiffs the counsel fees and the costs and out-of-pocket disbursements in the amount and at the time provided for Part B hereof.

PART B

COUNSEL FEES

12. Amfac hereby agrees to pay to the counsel for plaintiffs, Dilworth, Paxson, Kalish, Levy & Coleman, Kenneth P. Kimmel, Esq., Alexander Kahan, Esq. and Padgett, Greeley, Marumoto & Akinaka, for services performed in the action and for all judicially compensable costs and out-of-pocket disbursements of every description incurred by plaintiffs and their counsel in connection with the action, the sum of THREE

HUNDRED EIGHTY-FIVE THOUSAND DOLLARS ($385,000.00).

13. Amfac and the above-named defendants and their counsel agree that the payment of the amount set forth in paragraph 12 hereof will not bar an application by plaintiffs' counsel to the Court for an allowance of attorneys' fees, costs and out-of-pocket disbursements from any fund which might be created for the benefit of the plaintiffs and the classes they represent as the result of the original appraisals. Amfac and the above-named defendants and their counsel stipulate that they will make no objection to an application for such an allowance which does not exceed twenty percent (20%) of such fund.

14. Amfac shall pay to Dilworth, Paxson, Kalish, Levy & Coleman on behalf of all counsel for the plaintiffs the counsel fee and the costs and out-of-pocket disbursements provided for in paragraph 12 hereof no later than 14 days after the Court's approval of the Class Action Settlement Agreement set forth in Part A hereof becomes final pursuant to Rule 23, Federal Rules of Civil Procedure and the time within which plaintiffs or other class members may appeal therefrom expires.

PART C
MISCELLANEOUS

15. Prior to its appointment by the Court, the investment banker shall be instructed by the Court to disclose in writing to the Court and counsel for the parties

any fact which might be the basis of a conflict of interest. In the event that a conflict is disclosed, any of the parties may request that the Court disqualify the investment banker. In the event that the investment banker is not willing to serve or is disqualified from serving, then the investment banker shall be a similarly competent firm which shall be acceptable to all parties. Approval of any such successor investment banker shall not be unreasonably withheld by any party.

16. The parties hereby agree that they will prepare and execute all documents of any kind necessary to implement the provisions of this Stipulation of Settlement within a reasonable time after being requested to do so, including but not limited to a final consent judgment or decree to be entered by the Court forthwith upon its approval of the Class Action Settlement Agreement pursuant to Rule 23, Federal Rules of Civil Procedure, under which judgment or decree the court would retain jurisdiction over the parties and all other persons not parties hereto but involved in the action and over the subject matter of the action, for the sole purpose of implementing and enforcing the Class Action Settlement Agreement as so approved.

17. The parties hereby agree that they will execute all necessary and appropriate dismissals and releases relating to the action.

18. The parties hereby agree that any such final consent judgment or decree or dismissal or release relating to this action shall include defendants Dean Wit-

ter & Co., Dean Witter & Co., Inc. and Haskins & Sells (hereinafter called the "additional defendants") and shall release and discharge all claims by plaintiffs against said additional defendants as though they were parties to this Stipulation of Settlement.

19. The parties hereby agree to move the Court in this action for an order approving this Stipulation of Settlement and setting a date for a hearing at which time any member of the respective classes in this action may appear in person or by attorney to show cause why this action should not be compromised, settled and disposed of as proposed in this Stipulation of Settlement.

DATED: This 2nd day of August, 1971.

DILWORTH, PAXSON, KALISH, LEVY & COLEMAN

By /s/ Bruce W. Kauffman
On Behalf of Plaintiffs and
Attorneys for Plaintiffs Listed
Above

CADES SCHUTTE FLEMING & WRIGHT

By /s/ E. Gunner Schull
On Behalf of Defendants Listed Above

No. 73-2365.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DERICKSEN M. BRINKERHOFF, etc., *et al.*,

Appellants,

vs.

AMFAC, INC., *et al.*,

Appellees.

Motions by Amfac, Inc. to Dismiss Frivolous Appeal and to Impose Sanctions.

To the Honorable Justices of the United States Court of Appeals for the Ninth Circuit:

Appellee, Amfac, Inc., hereby moves the Court to dismiss the within appeal on the ground that it is frivolous and without merit. Appellee further moves the Court, pursuant to Rule 38 of the Federal Rules of Appellate Procedure and 28 U.S.C. §1912 for an award of attorneys' fees, just damages and double costs.

Respectfully submitted,

CADES, SCHUTTE, FLEMING & WRIGHT,
DOUGLAS E. PRIOR, ESQ.,
DEBEVOISE, PLIMPTON, LYONS & GATES,
SAMUEL E. GATES, ESQ.,
IRWIN J. SUGARMAN, ESQ.,
GENDEL, RASKOFF, SHAPIRO & QUITTNER,
MARTIN GENDEL, ESQ.,
RICHARD S. BERGER, ESQ.,
By MARTIN GENDEL,
Attorneys for Appellees.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS TO DISMISS FRIVOLOUS APPEAL AND TO IMPOSE SANCTIONS.

This memorandum is submitted in support of the motions of defendant-appellee Amfac, Inc. to dismiss the within appeal as frivolous and without merit and to impose sanctions. The sole question presented by these motions is whether appellant can maintain this appeal in good faith when, pursuant to a Stipulation of Settlement entered into by the parties to this action under date of August 2, 1971, he has stipulated that an appraisal ". . . shall be final, conclusive and binding on the parties, and no appeal shall lie therefrom."

I.
STATEMENT OF THE CASE.

In May of 1969, a lawsuit entitled *Northern Acceptance Trust 1065 by C. Jon Handy, Trustee, and Dericksen M. Brinkerhoff, etc. v. Amfac, Inc., The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. Kekaha Sugar Co., Ltd., et al.*, was commenced in the United States District Court for the Central District of California by minority shareholders of Lihue, Puna and Kekaha (the "plantations") [I C.T. 3].* The action purported to be brought as a class action on behalf of all minority shareholders of the three plantations, and as a derivative action on behalf of these same three plantations as they existed prior to a merger with Am-

*All references to ".... C.T. ...." refer to the particular volume and page number of the Clerk's Transcript on appeal. All references to "R.T. .... (date)" refer to particular portions of the Reporter's Transcript of the proceedings held before the Court below.

fac, Inc. The complaint alleged violations of Section 17(a) of the Securities Act of 1933, and Sections 10 (b) and 14(a) of the Securities Exchange Act of 1934 and the regulations promulgated thereunder, as well as breach of common law fiduciary duties and fraud, all in connection with the reorganization and merger of the three plantations into wholly owned subsidiaries of Amfac, Inc. As part of the merger, the holders of the minority interest were to receive Amfac, Inc. stock in exchange for their holdings of plantation stock.

By order of the United States District Court for the Central District of California (affirmed by this Court) the action was subsequently transferred to the United States District Court for the District of Hawaii where, on January 26, 1971, the Honorable C. Nils Tavares granted plaintiffs' motion to maintain the action as both a class and derivative action [XI C.T. 3458]. The Court's opinion is officially reported at 51 F.R.D. 487 (D. Hawaii 1971).

In May of 1971 the District Court found that there had been a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, and granted appellant's motion for partial summary judgment in favor of plaintiffs and against Amfac, Inc., and certain other named defendants on the issue of liability [XIV C.T. 4338; R.T. 5-8 (May 5, 1971)]. On May 17, 1971, the District Court denied defendants' motion for certification of an interlocutory appeal from its decision [R.T. 26-27 (May 17, 1971)], leaving defendants the right to appeal after trial of the case.

Shortly thereafter arduous and extensive arms length settlement negotiations commenced between counsel for appellant (representatives of the law firm of Dilworth, Paxson, Kalish, Levy & Coleman, hereinafter referred to as "the Dilworth firm") and counsel for Amfac. These negotiations resulted in a Stipulation of Settlement dated August 2, 1971 ("Stipulation") which the District Court by Opinion and Order entered on November 15, 1971 [XVII C.T. 5290] found to be fair, adequate and reasonable.

The terms of the Stipulation provided that there would be a reappraisal of the value of each of the three plantations as of the date of the mergers. This reappraisal was to be conducted by independent experts to be appointed by and under the supervision of the Court, and, in fact, was conducted by Eastman Dillon-Union Securities & Co. and Gilbert Root, the latter an experienced appraiser of Hawaii real estate. The settlement agreement specifically provided that the appraisals were to be final, conclusive and binding on the parties, with no appeal or review allowed therefrom. If, as a result of the reappraisal, it was found that the values attributed to the stock in any of the plantations was greater than the value of the Amfac stock received in exchange for the plantation stock, Amfac would be required to pay into Court for the benefit of the minority stockholders the excess of the values determined by the reappraisal—eighty percent in common stock of Amfac and twenty percent in cash.

In addition, the settlement agreement provided that Amfac was to pay $385,000.00 to all plaintiffs' counsel for fees and cost disbursements. This money, plus an added $20,000, has been paid; the major portion being received and retained by the Dilworth firm.

On November 22, 1971, the settlement having previously been approved, the Court entered an Order dismissing the action with prejudice, as to all defendants, but reserving jurisdiction over the administration of the settlement [XVII C.T. 5317].

Northern Acceptance Trust appealed the orders approving the settlement and dismissing the action to this Court. On May 17, 1972, this Court dismissed the appeal [XVIII C.T. 5570], and on June 12, 1972, it denied a motion by Northern Acceptance Trust to vacate and set aside the dismissal of the appeal [XVIII C.T. 5571]. Early in June 1972, Northern Acceptance Trust filed motions for a stay of the mandate and for enlargement of time to permit the filing of a Petition for Rehearing and Suggestion for Appropriateness of Hearing in Banc of Motion to Vacate and Set Aside Dismissal of Appeal. On July 21, 1972, this Court entered an Order denying the motions for stay of mandate and for enlargement of time.

Subsequently, Eastman Dillon-Union Securities & Co. filed and served its written appraisals, assisted by Gilbert W. Root, as the real estate appraiser [XVIII C.T. 5688]. The results of the appraisals substantiated the values attributed to the plantation stock in the original merger transaction objected to by the classes, and resulted in no increase in the exchange values, and, therefore, no recovery by the minority shareholders.

On November 6, 1972, appellant moved to set aside the appraisals on the ground that the appraisers had not performed their assigned duties as instructed, and that the appraisals were "fraudulent, grossly irregular [and] fundamentally unfair". After extensive examination and cross-examination of witnesses during a three-day hearing in December 1972, and legal briefing and argument, on March 19, 1973 the Court made and entered its Decision on Challenge to the Validity of Eastman Dillon's Appraisals, in which it denied all motions to set aside the appraisals and directed that said appraisals take effect under the terms of the previously approved settlement agreement. On March 23, 1973, the District Court signed and entered a judgment incorporating its decision with respect to the appraisals [XX C.T. 6238]. Because of improper notice to opposing counsel, on March 30, 1973, the District Court vacated its judgment of March 23, 1973 and ordered that the proposed judgment be submitted to counsel for plaintiffs for approval. After extensive briefs had been filed by all parties with respect to the form of the judgment, the matter was resubmitted without oral argument and on May 2, 1973, the District Court confirmed its original judgment and reinstated it as of March 23, 1973 [R.T. 9 (May 2, 1973)].

By stipulation dated April 24, 1973, Northern Acceptance Trust 1065 waived any right to appeal from the March 23, 1973 judgment. Hence, as to Northern Acceptance Trust, this litigation has been terminated. Plaintiff Brinkerhoff, however, on behalf of the classes, has prosecuted this appeal from the judgment of March 23, 1973.

II.

THE SETTLEMENT AGREEMENT.

A. The Stipulation of Settlement by Its Terms Provides That the Appraisals Are Not Subject to Appeal.

As set forth above, the Stipulation of Settlement provided that the appraisals ". . . shall be final, conclusive and binding on the parties, and no appeal or review shall lie therefrom." [XV C.T. 4802-4803]. This clause was the foundation of the settlement, and was intended so to be, as is clearly demonstrated both by the structure of the settlement agreement, as incorporated in the Stipulation of Settlement, and the representations made by counsel at the time it was submitted to the Court and the shareholders. What appellant and his counsel here seek to accomplish in the guise of an appeal is to vitiate both the letter and the intent of the Stipulation of Settlement and the District Court's opinion in connection with its approval. This is made clear by a review of the terms of the Stipulation and the proceedings had in connection with it.

The gravamen of the complaint in this action concerned the question of whether the exchange ratios used by Amfac in effectuating the merger of the three plantations were arrived at as the result of the recommendations of "independent" appraisers. The Stipulation of Settlement thus provided for the appointment by the Court of an independent investment banker to act as its officer performing the reappraisals contemplated by the Stipulation of Settlement (Stipulation ¶2) [XV C.T. 4802]. Recognizing, however, that even where the appraisals are performed by an independent, court appointed appraiser, the parties might have useful

insight to shed on the subject, the Stipulation provided in paragraph 6 that:

> "Within 15 days after the filing and service of the original appraisals, any of the parties may serve on the investment banker and file with the Court and serve upon opposing counsel written comments relating thereto; provided, however, that such written comments shall be advisory only and the investment banker may adopt or reject any such written comments, in whole or in part, or give such other affect to such written comments, as it may deem advisable." [XV C.T. 4802].

Paragraph 7 went on to provide that if comments were served and filed, the appraisals would become final thirty days after they were filed, but if no comments were filed, the appraisals would become final fifteen days after they had been filed. Notwithstanding the provision for comments, however, the Stipulation went on in paragraph 7 specifically to state that:

> "The appraisals, prepared by the investment banker shall be final, conclusive, and binding on the parties, *and no appeal or review shall lie therefrom.*" [Emphasis added] [XV C.T. 4802-4803].

Consistent with the terms of the Stipulation itself, and attached to it as Exhibit "A" was a proposed Order for appointment of the appraiser. That Order stated in the last paragraph thereof:

> "Your final decision as to the determination of the fair market value of a share of capital stock of the plantation companies will be final and binding upon the parties and non appealable." [XV C.T. 4811].

B. The Notice to the Class.

Pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, notice of the proposed settlement was mailed to each member of the plaintiff classes. Of paramount importance is the fact that in that notice the members of the classes were informed that:

> "Said appraisal will be under the sole direction and supervision of the Court, *and will be final, conclusive and binding on the parties and no appeal or review will be allowed therefrom.*" [Emphasis added] (XVI C.T. 4994].

Obviously, if appellant is permitted to maintain this appeal, the above-quoted portion of the class notice will have been rendered false.

C. Proceedings to Approve the Stipulation of Settlement.

(1) The Representations of Appellant's Counsel.

On September 8, 1971, after the Stipulation of Settlement had been submitted to the Court for its approval, Northern Acceptance Trust 1065 moved to strike the Stipulation of Settlement [XV C.T. 4905]. On September 15, 1971, the Dilworth firm, on behalf of plaintiff and appellant Brinkerhoff, filed a Memorandum in Support of Submitting the Proposed Stipulation of Settlement to the Court and to the Classes and in Opposition to the Motion of Northern Acceptance Trust to Strike [XVI C.T. 5000]. In that Memorandum, appellant characterized the Stipulation of Settlement as follows:

> "The investment banker will file its appraisals with the Court and serve them upon counsel no later than six months after its appointment. Any

> of the parties may then file written comments, which the investment banker may adopt or reject in whole or in part as it may deem advisable. The appraisals thus prepared by the investment banker will be final, conclusive and binding on the parties, *and no appeal or review will lie there from.*" [Emphasis added] [XVI C.T. 5005].

One of the moving forces behind the Stipulation of Settlement, and the drafter thereof for the plaintiffs, was the Dilworth firm. Now, on behalf of the plaintiff classes, that same firm attempts to avoid its specific agreement not to prosecute an appeal from the decision of the appraisers, as approved by the District Court. It has become apparent in this action that counsel for appellant are the protagonists and directing force behind this litigation rather than the nominal appellant. In effect, counsel for appellant have so admitted in their September 15, 1971 Memorandum in Support of the Stipulation of Settlement where they stated:

> "The role of the named plaintiffs as representative parties is passive only. To qualify as an adequate representative under Rule 23(a)4, the representative need only show absence of interests antagonistic to the remainder of the class and claims typical of those of the entire class. The representative party's attorney, however, must be 'qualified, experienced and generally able to conduct the proposed litigation', which is the 'essential concomitant of adequate representation' . . . The importance of the attorney's obligations to the absent class members is reflected in Professor Moore's comment that the absent class members' '*nominal* representative is a self-appointed repre-

> sentative and *their real representative is a lawyer* chosen by the self-appointed representative. . . .' 3 B Moore, Federal Practice, Par. 23.55 at 23-1159 (2d ed. 1969)." [Emphasis in original] [XVI C.T. 5013-5014].

In substance, the position taken by counsel for appellant on September 15, 1971, was that a settlement proposed by them, as attorneys for a class, could be approved by the Court even though Northern Acceptance Trust 1065, the named class-plaintiff, specifically disapproved of that settlement. In this case, said counsel participated in drafting the Stipulation of Settlement, including the provision that the determination of the appraisers would be final, binding and nonappealable and continually argued that position before the Court.

On September 17, 1971, the District Court held a hearing on the fairness, adequacy and reasonableness of the proposed settlement. On the same day, appellant filed an additional Memorandum in Support of Proposed Settlement [XVI C.T. 5138]. Most revealingly, in that Memorandum, appellant stated:

> "The proposed settlement also eliminates the risk to plaintiffs which continuing this litigation would necessarily entail. In the absence of a settlement, expensive and time-consuming appeals on the merits would be inevitable. It is impossible to predict with certainty the ultimate disposition of this case upon appeal. Thus, the members of the classes would face the risks of reversal on liability, on damages or on both. *The proposed settlement provides that the appraisals shall be final, conclusive and binding on the parties, and no appeal or review will lie therefrom.*

> "Hence, the proposed settlement *guarantees* for the classes that which prosecution to final judgment could not, i.e., an *independent* appraisal of the value of the plantation shares they surrendered, recovery of the difference between that and what they in fact received, *and no appeals.*" [Emphasis added] [XVI C.T. 5144-5145].

During oral argument on September 17, 1971 with respect to the fairness and adequacy of the proposed settlement, counsel for appellant, describing the proposed settlement, stated to the District Court:

> "We saw a way here to prevent not only three separate jury trials, but a way to prevent appeal because the settlement which we propose to this Court contemplates that the conclusions of the independent investment banker will be final and binding on all parties." [R.T. 69-70 (September 17, 1971)].

Later during the same hearing, counsel for appellant argued that the proposed settlement should be approved for reasons of economy, stating:

> "In addition, of course, in order to continue through the trials, it would have been necessary to spend a great deal of money for travel expenses and for living expenses and other expenses which obviously are inherrent [sic] in continuing the three jury trials and the appeals which necessarily would have followed." [R.T. 75 (September 17, 1971)].

Again, in arguing that the proposed settlement would save time, counsel for appellant stressed the fact that

there would be no appeal from the independent appraisals, stating:

> "I think that another fact that has to be considered here, Your Honor, is that this is really not only a saving of judicial time, but it's also a saving of time for members of the classes because all of this will be disposed of without the necessity of the long arduous appeals—not only on the question of the amount of damages, but clearly on the issues of law that are involved in this case. As Your Honor knows, the issues of law were very hard fought and we felt that we would definitely face appeals in the event that we had to continue through the end of this litigation." [R.T. 76-77 (September 17, 1971)].

Subsequently, in the same hearing, counsel for appellant noted that the appraisals to be prepared by the investment banker "will be final, conclusive and binding on the parties and no appeal or review will lie from the appraisals." [R.T. 78 (September 17, 1971)].

It is shocking that in attempting to prosecute this appeal, counsel for appellant should now take a position in which they attempt to avoid all of their earlier representations to the Court, the members of the classes and the other parties to this litigation.

(2) The Opinion and Order Approving the Stipulation of Settlement.

At the conclusion of the September 17, 1971 hearing, the District Court requested counsel for appellant to prepare a short narrative decision which the Court could use as a draft for its Order. Specifically, the Court said:

> "Now in order that there may be some semblance of coherence, I'm wondering if I'm going

> too far in suggesting or asking or ordering that Mr. Kauffman [counsel for appellant] prepare a short narrative decision along the lines of the rulings I have made *adopting his theories generally set forth in his memoranda* and present it to the other counsel and then I will revise it so that we'll have in one place or other—rather than any long mixed up record of questions and answers and interruptions—a narrative and coherent statement of what the Court has ruled today." [Emphasis added.] [R.T. 108 (September 17, 1971)].

Counsel for appellant did, in fact, prepare such a draft and the final Opinion and Order, filed on November 15, 1971 [XVII C.T. 5290], provides in part (evidently adopting the language suggested by counsel for appellant):

> "By agreeing upon a Court supervised investment banker whose appraisals will be final and binding, the parties have themselves fashioned a fair method for determination of all damages without the necessity of incurring the considerable risks and expenses of three jury trials and the appeals that inevitably would have followed. Thus, the proposed settlement provides plaintiffs with *all damages* to which they would have been entitled had they proceeded to trial, without the wasteful and costly duplication which inheres in adversary proceedings, particularly those involving Hawaii's unique land system. Indeed, the proposed settlement guarantees to plaintiff that which prosecution to final judgment could not, i.e., an independent appraisal of the value of the plantation shares they surrendered, recovery of the difference between that and what they in fact received, and no appeals." [XVII C.T. 5296-5297].

D. The Motion to Set Aside the Appraisals.

On September 5, 1972, Eastman Dillon-Union Securities & Co. filed its appraisal, which appraisal concluded that the minority shareholders of the plantations had received more than fair value for their stock [XVIII C.T. 5668-5673]. On November 6, 1972, appellant moved to set aside the appraisal. Appellant's motion stated:

> "AND NOW, this 3rd day of November, 1972, having filed and served their comments upon the appraisals of Eastman Dillon-Union Securities & Co. ('Eastman Dillon') and Gilbert W. Root ('Root'), and the appraisers not yet having corrected their appraisals in accordance with said comments, plaintiffs Dericksen M. Brinkerhoff and the members of the class, by their undersigned counsel, hereby respectfully move this Honorable Court to set aside the appraisals of Eastman Dillon and Root on the grounds that Eastman Dillon and Root have failed to perform their assigned duties as instructed by this Court and that said appraisals are *fraudulent, grossly irregular, fundamentally unfair* and contrary to the settlement of this action approved by this Court on November 15, 1971. . . ." [Emphasis added] [XIX C.T. 5889].*

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*At every available opportunity prior to the hearing before the lower court, particularly during the period prior to the time Judge Pence indicated he would hold a hearing on the question of whether the Appraisers' report should be accepted and approved, counsel for appellants made repeated charges and allegations of fraud. It was largely because of such charges that a hearing was held. When it did take place, however, appellants submitted no evidence of fraud. Appellants had thus bootstrapped their way through the courthouse doors and then promptly

(This footnote is continued on next page)

On November 6, 1972, plaintiff Northern Acceptance Trust, by its counsel, filed a similar motion [XIX C.T. 5912].

All parties filed substantial legal memoranda and, in December 1972, the court heard three days of testimony by the investment banker and the real estate appraiser, most of it the result of cross-examination by appellant's counsel. Thereafter, on March 19, 1973, the District Court filed its Decision on Challenge to the Validity of Eastman Dillon's Appraisals [XX C.T. 6216]. In that decision the Court wrote:

> "The court is satisfied that neither Eastman Dillon nor Root committed any fraud whatsoever in this case. Nor did plaintiffs proffer any evidence of actual fraud in the performance of their duties.
>
> Plaintiffs also urge setting aside the appraisals on a constructive fraud theory. . . . Plaintiffs in effect argue that certain appraisal techniques used as well as some not used by the appraisers resulted in what amounts to false appraisals and thus constitute constructive fraud. . . .
>
> As more fully discussed hereafter, this Court finds that the use or non-use of certain appraisal techniques or methods by Eastman Dillon and Root were matters of professional selection and

---

dropped the charge of fraud and charged instead that the appraisers had not followed the court's instructions. By this appeal, appellants seek review of findings which would not have been made absent their fabricated charges of fraud. This is more fully set forth in the letter of October 25, 1972 from E. Gunner Schull, Esq., one of Amfac's counsel to Judge Tavares [XIX C.T. 5866], and in the "Memorandum of Defendant Amfac, Inc. in Support of Its Cross Motion to Vacate Hearing, etc.," particularly pages 3 to 19 thereof [XIX C.T. 6016].

judgment. Therefore, unless plaintiffs were able to show that false representations had been made, that certain techniques and methods were used or not used by the appraisers, would not, per se, constitute or result in constructive fraud. Neither in plaintiffs' memoranda nor at the hearings have they shown any such false representations on the part of either appraiser." [XX C.T. 6219].

In conclusion, the District Court stated:

"This court finds that the appraisers fully and correctly performed their duty as provided by the Settlement Agreement and in accord with Judge Tavares' instructions, and that there was no error in any of the Eastman Dillon Appraisals.

The motion to set aside the appraisal is DENIED, and the appraisals will take effect under the terms of the Settlement Agreement." [XX C.T. 6231].

A judgment, encompassing the substance of the lower court's opinion of March 19, 1973 and submitted by Amfac, was filed on March 23, 1973 [XX C.T. 6238]. That judgment was vacated by order dated March 30, 1973 because it had not been circulated among all counsel for approval, prior to submission to the Court [XX C.T. 6252]. Appellant's only objection to the judgment prepared by counsel for Amfac was directed to Paragraph 3 of that judgment which provided:

"Pursuant to Paragraph No. 7 of the August 2nd, 1971 Stipulation of Settlement and the November 15, 1971, Opinion and Order of U.S. District Judge C. Nils Tavares, in the within proceedings, approving the aforesaid settlement, and

> more particularly as set forth on page 6 of said Opinion and Order, the appraisals are now final, conclusive, and binding on the parties, and no appeal or review will lie therefrom."

After briefing the question as to form of judgment, the matter was submitted without oral argument. On May 2, 1973, the District Court announced its decision in open court, and in part stated:

> "The record indicates that plaintiffs have filed certain memoranda objecting to the defendants' proposed form of judgment. I find that those objections are entirely without merit. The fact that they [plaintiffs] objected to them in the first place, as I read it, *it was in derogation not only of the words and phrases of the agreement to settle this case . . . but now they propose to appeal from the judgment. . . .*
>
> *The position of the plaintiffs that they have right to appeal I feel is not founded in fact or law.* Paragraph 7 of the Stipulation of Settlement clearly states that the appraisals prepared by the investment banker shall be final, conclusive and binding on the parties and no appeal or review therefrom. And in the November 15 opinion and order of Judge Tavares approving that stipulation of settlement provided on Page 6: Absent fraud or collusion, the appraisals prepared by the investment banker will be final, conclusive and binding on the parties and no appeal or view will rely [sic] therefrom." [Emphasis added.] [R.T. 2-3 (May 2, 1973)].

Thereafter, in the course of rendering his opinion, Judge Pence stated:

> "As stated by Judge Tavares, as stated by the parties themselves, this litigation was to come to an end whenever the Court passed upon and found that there was no fraud or collusion and the appraisals were properly made by the appraisers appointed by the Court and made their appraisals. Under the circumstances, very frankly, the position taken by Brinkerhoff and the other plaintiffs here who objected to the judgment so closely borders upon the specious and fictitious and not made in good faith that the Court—I'll change that—the Court would be ready to find that the time and effort which the Court has had to take and given to this case was not called for; that it was—that the objections were not made in good faith and the claim of right to appeal is not being made in good faith, but I do not wish to prolong the litigation unduly myself, so I won't make that finding, and solely for that reason." [R.T. 4-5 (May 2, 1973)].

The Court thereupon reinstated the judgment filed by Amfac on March 23, 1973 as of that date, stating "it was good then and it's good now." [R.T. 9 (May 2, 1973)]. The only purpose served by appellant's objections to the form of the judgment was to delay entry of that judgment from March 23, 1973 until May 2, 1973 and to cause Amfac to incur further attorneys' fees in opposing appellant's objections. Appellant now appeals from that judgment.

III.
ARGUMENT.

A. Appellant Has Waived His Right to Appeal.

This appeal is an arrogant and ill-disguised attempt by appellant and his counsel to vitiate both the letter and intent of the stipulation of settlement in this action and the opinion of the District Court rendered in connection with the judicial approval of that settlement. No tenable argument can be presented in support of this appeal, especially in light of the fact that appellant apparently admits that he cannot appeal from the appraisers' determination of value. The exchange of letters between counsel and the Court below reveals the contrived nature of appellant's assertions [XX C.T. 6299-6312]. The closest that appellee can come to paraphrasing what appellant contends is by quoting from a letter written by the Dilworth firm to the District Court on May 8, 1973 [XX C.T. 6304]. There, the Dilworth firm states:

> "Your Honor recognizes that this litigation could not end until the Court found that the appraisals were properly made by the Court-appointed appraisers. . . . Your Honor notes that you had concluded that the appraisers had each conformed fully and completely with the instructions of Judge Tavares. It is with this conclusion and the Order resulting therefrom that we respectfully disagree and from which, we respectfully submit, we have a right of appeal."

The purpose of appellant's appeal was again set forth in a letter written by the Dilworth firm to the District Court on May 18, 1973 [XX C.T. 6310], where Mr.

Kauffman stated: "We are appealing only from Your Honor's determination that the appraisers complied with the instructions of Judge Tavares and the agreement of settlement." Surprisingly in the very same letter, Mr. Kauffman inconsistently stated: "We seek only to enforce the terms of the settlement agreement, not to deviate therefrom."

This is such patent sophistry that it stretches credulity for appellant to assert the appeal is being prosecuted in good faith. If the determination of value as found by the appraisers is beyond appeal, then the steps taken in reaching such determination similarly must be nonappealable. The Decision of the District Court on March 19, 1973 found only that the appraisers' determination of value was performed in accordance with Judge Tavares' instruction and the value was correct. No portion of that judgment is appealable. The value determined was the ultimate goal of the settlement; everything else was incidental. To argue seriously that one is not questioning the results of an appraisal, but at the same time may seek review of the means used to obtain such results is in flat contradiction to the entire spirit of the Stipulation in this action. On every possible occasion it was emphasized that the appraisals "shall be final and binding and that no appeal shall lie therefrom." There are no words of limitation or qualification in that Stipulation, nor were such words used by appellant's counsel in any of the arguments before the District Court. Nowhere was there a reservation of a right to appeal from the manner in which the appraisers construed their instructions. In fact, had such a reservation of rights been proposed, the settlement would never have been consummated and the Dilworth firm and other counsel

for appellant would not have in their pockets substantial fees and costs in a sum approximating $385,000.00, which they continue to retain while advocating the prosecution of this appeal. One reaches the inescapable conclusion that this appeal is merely another transparent attempt to generate additional fees for appellant and his counsel.

Moreover, this appeal is improper as a matter of law. The Ninth Circuir is no stranger to such groundless appeals and has clearly and emphatically supported the logical rule of law that if parties to an action, based on adequate consideration, have stipulated that no appeal shall be taken, that stipulation will be enforced by the Court and an appeal in contravention thereof will be dismissed. The most succinct statement of this principle appears in *United States Consol. Seeded Raisin Co. v. Chaddock & Co.*, 173 Fed. 577, 579-580 (9th Cir. 1909), cert. denied, 215 U.S. 591 (1910), where the Court stated:

> "While in some jurisdictions it has been held that a mere promise or agreement not to prosecute an appeal will not divest an appellate court of its jurisdiction (*Sanders v. White*, 22 Ga. 103; *Fahs et al. v. Darling, et al.*, 82 Ill. 142; *Runnion v. Ramsay*, 93 N.C. 410), the contrary had been held in other jurisdictions; and it seems to be universally held that, where such an agreement is made upon a valid and legal consideration, either before or after trial, it will be enforced in an appellate court, and the appeal, if taken, will be dismissed (*Townsend v. Masterson, etc.*, 15 N.Y. 587; *Cole v. Thayer*, 25 Mich. 212; *Oliver v. Blair* [Cal.] 5 Pac. 917; *Saling v. German Sav-*

ings Bank [Com. P1.] 8 N.Y. Supp. 469; *Commonwealth v. Johnson*, 6 Pa. 136; *Wheeler v. Floral M. & M. Co.*, 10 Nev. 200; *Hill v. Hermans*, 59 N.Y. 396; *Mackey, Executor v. Daniel*, 59 Md. 484; *Emerick v. Armstrong et al.*, 1 Ohio 513; *Johnson v. Halley*, 8 Tex. Civ. App. 137, 27 S.W. 750)."

In accord with the foregoing, see also *Loew v. Willacy*, 239 F.2d 179, 179-180 (9th Cir. 1956); *Bell v. United States*, 9 F.2d 820, 821 (9th Cir. 1925).

In *Gramling v. Food Machinery and Chemical Corp.*, 151 F. Supp. 853, 856 (W.D.S.C. 1957) the parties entered into a compromise agreement which provided, among other things, that the plaintiff's damages would be determined by arbitration and that the arbitration award, if signed by at least four arbitrators, would be "binding upon the parties hereto, without any right of appeal from the award." One of the parties moved to set aside the award on the ground that the award was so grossly excessive as to amount to fraud, that the arbitrators violated the provisions of the arbitration agreement and the Court's instructions relative to the measure of damages and, finally, that the award was invalid under the Federal Arbitration Act. The Court denied the motion stating that "a contract not to appeal, if supported by consideration, is binding upon the parties to it. . . . Defendant is bound by its contract to accept the award as final, and not to appeal from it. If either party could now attack the award, that contract would be meaningless."

Appellee respectfully submits that if appellant and his counsel are now permitted to vitiate the settlement agreement in this case by way of this appeal, they

render nugatory more than two years of diligent work on behalf of all counsel, the Court, Court-appointed appraisers and the parties themselves. The settlement agreement and the various orders confirming it were primarily the craftsmanship of counsel for appellant. They should not now be permitted by glib and unsupportable reasoning to attack that very same agreement.

It is settled law that a party cannot appeal from an order or judgment under which he has accepted a benefit. *Wilson v. Pantosote Co.*, 254 F.2d 700, 702 (2d Cir. 1958); *Colquette v. Crossett Lumber Co.*, 149 F.2d 116, 118 (8th Cir. 1945). Similarly, "it is old and established law that one who has secured a judgment cannot retract a condition to which he assented in order to obtain it." *Movible Offshore Co. v. Ousley*, 346 F.2d 870, 874 (5th Cir. 1965). In the instant case, not only has appellant and the classes he purportedly represents benefited from the expense-free reappraisal of their plantation stock, but also, appellant has benefited by the fact that this counsel have been paid (and have retained) substantial attorneys' fees and costs. Significantly, counsel for appellant have not volunteered to return the benefit they obtained under the judgment approving the Stipulation of Settlement, which judgment included, as an integral part thereof, an express provision that the determination of the appraisers would be final and binding and that no appeal would lie therefrom.

Also well established is the legal principle that by consenting to an entry of judgment, a party waives his right to appeal. Here, by stipulation, appellant consented to the entry of a judgment in which he and the classes that he purportedly represents, as well as his counsel, agreed to be bound by the results of a Court-

supervised appraisal. Appellant and his counsel further specifically agreed that there could be no appeal from that appraisal. Appellant now seeks to appeal and at the same time to retain the benefit of the fact that appellee did not appeal from the order certifying the action as a class and derivative action and similarly gave up its right to appeal from the order granting appellant's motion for partial summary judgment. Unquestionably, the District Court considered appellee's waiver of its right to appeal from the order granting summary judgment a waiver of a significant right. In his Opinion and Order finding the Stipulation of Settlement fair, adequate and reasonable, Judge Tavares stated:

> "Although summary judgment was granted to plaintiffs under Section 10(b) of the 1934 Act, the outcome of an appeal on liability is uncertain since Amfac controlled all three plantations and could have consummated the mergers without the vote of a single minority shareholder." [XVII C.T. 5297 (Footnote)].

Additionally, neither appellant nor his counsel complain that they have received and retained substantial attorneys' fees and costs pursuant to the judgment to which they consented. Certainly, even if the judgment did not specifically provide for a waiver of appeal (which it clearly and unequivocally does) such conduct constitutes a waiver of any right to prosecute an appeal. *Stanford v. Utley*, 341 F.2d 265, 271 (8th Cir. 1965); *White & Yarborough v. Dailey*, 228 F.2d 836, 837 (5th Cir. 1955); *Stewart v. Lincoln-Douglas Hotel Corp.*, 208 F.2d 379 (7th Cir. 1953).

B. This Court Has the Power to and It Should Dismiss This Appeal as Frivolous and Not Made in Good Faith.

It is unquestioned that a Court of Appeals may, in the exercise of its plenary power, dismiss a civil appeal as frivolous. *United States v. Madden,* 352 F.2d 792, 794 (9th Cir. 1965); *Pacific Westbound Conference v. United States,* 332 F.2d 49, 51 fn. 5 (9th Cir. 1964); *Wheeldin v. Wheeler,* 280 F.2d 293, 294 (9th Cir. 1960); *John v. Gibson,* 270 F.2d 36, 39 (9th Cir. 1959), cert. denied 361 U.S. 970 (1960); *Jiminez v. Barber,* 252 F.2d 500, 554 (9th Cir. 1958). See also Rule 38, Federal Rules of Appellate Procedure.

A number of state courts also have specifically held that parties to an action may waive their right to appeal. See, *e.g., C. G. Horman Co. v. Lloyd,* 28 Utah 2d 112, 449 P.2d 124, 126 (1972); *Mellwin Const. Co. v. Selinger,* 128 Colo. 1, 259 P.2d 612, 613-614 (Colo. Sup. Ct. 1953); *Wyrzykowski v. Budds,* 325 Mich. 199, 38 N.W. 2d 313, 315 (1949); *Phelps v. Blome,* 150 Neb. 547, 35 N.W. 2d 93, 95-96 (1948); *Speeth v. Fields,* 47 Ohio L. Abs. 47, 71 N.E. 2d 149, 150 (1946); *Harmina v. Shay,* 101 N.J. Eq. 273, 137 Atl. 558 (1927); *Southern Indiana Power Co. v. Cook,* 182 Ind. 505, 107 N.E. 12, 14 (1914); *Hoste v. Dalton,* 137 Mich. 522, 100 N.W. 750, 751-752 (1904).

Of particular pertinence is the statement of the Supreme Court of Indiana in *Southern Indiana Power Co. v. Cook, supra:*

> "Now in the case before us the essence of the agreement was that the appraisers agreed upon by the parties and appointed by the court should

fix the amount that appellant should pay to appellee Cook for lands of his which it had taken and subjected to a use from which such land could not be released, and that the amount fixed should be final and binding on both parties as the measure of appellee's damages. The judgment was proper, and the agreement is amply broad and comprehensive enough to cover it. It was evidently the intention of the parties to settle the right of appellant in the lands of appellee and the compensation of the latter therefor finally in the lower court.

"The rule which obtains in a majority of jurisdictions is that a stipulation waiving the right to appeal is valid and binding and bars an appeal taken in violation of its terms. An objection to the appeal may properly be taken in the appellate court by a motion to dismiss based on the agreement."

The language and intent of the Stipulation of Settlement, the statements of appellant's counsel with respect thereto, and Judge Tavares' opinion approving the settlement and apointing the appraisers, are clear. Appellee waived its rights to appeal from the orders holding the action maintainable as a class action and granting summary judgment on the issue of liability. Appellee paid $385,000.00 to plaintiff's counsel, which has been retained. *All* parties agreed that none would have a right to appeal from the determination of the appraisers. Appellant's claim that this appeal is not really from the findings of the appraisers as to value but rather from the judgment of the District Court that the appraisers properly adhered to the instructions of

the Court in performing the duties imposed upon them by the settlement is pure sophistry and not made in good faith. One has only to refer to the statement of Judge Pence, made on May 2, 1973 at the time of the entry of the judgment from which this appeal purports to be taken that appellant's "right to appeal . . . is not founded in fact or law" to establish the lack of *bona fides.*

C. Appellee Is Entitled to Recover Just Damages, Including Attorneys' Fees and Double Costs, Incurred With Respect to This Appeal.

Rule 38 of the Federal Rules of Appellate Procedure provides:

> "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

Similarly, 28 U.S.C. § 1912 provides:

> "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

The Advisory Committee's note to Rule 38 of the Federal Rules of Appellate Procedure states:

> "Compare 28 U.S.C. §1912. While both the statute and the usual rule on the subject by courts of appeal . . . speak of 'damages for delay,' the courts of appeals quite properly allow damages, ed by the court in its discretion in the case of a appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay. . . . The subjects of interest and damages are separately regulated, contrary to the present prac-

> tice of combining the two . . . to make it clear that the awards are distinct and independent. Interest is provided for by law; damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as penalty against the appellant."

No court should be compelled to tolerate a frivolous appeal. In order to discourage such appeals, courts have been empowered to impose severe sanctions against parties who insist on prosecuting an unsubstantial appeal. The United States Supreme Court has stated that "where a writ of error or appeal is dismissed because the alleged ground therefor is so unsubstantial as to be frivolous, a penalty may be imposed." *Slaker v. O'Connor*, 278 U.S. 188, 190, 49 S.Ct. 158, 159, 73 L.Ed. 258 (1929); *Roe v. Kansas*, 278 U.S. 191, 193, 49 S.Ct. 160, 160-161, 73 L.Ed. 261 (1929); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 233-234, 43 S.Ct. 589, 592, 67 L.Ed. 961 (1923); *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 109, 33 S.Ct. 80, 83, 57 L.Ed. 140 (1912).

Reported cases from nearly every Circuit hold that an appellate court has the power (if not the duty) to award damages, attorneys' fees and multiple costs to an appellee upon dismissing a frivolous appeal. The most recent statement of this principle, which emphasizes the fact that frivolous appeals add needless volume to the already heavy volume of business of appellate courts is *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972):

> "[W]e deem Furbee's appeal from the order of dismissal to be, in the circumstances, utterly without merit and frivolous. The federal case law sup-

porting Vantage Press is unambiguous and unwavering [sic]. Appellant was made fully aware of the cases Appellee chiefly relied on in a memorandum in support of defendant's motion to dismiss, filed with the District Court and reprinted in Appellant's Brief. We find nothing in Appellant's argument on appeal which casts the remotest doubt on those cases. Notwithstanding the clear state of the law, Furbee pressed his appeal, involving Vantage Press in the inconvenience and expense of employing counsel to resist the appeal. Appellate Courts are burdened by a heavy volume of business and the problem is needlessly aggravated when frivolous appeals are taken. Justice we think, requires that the costs of this appeal, including the expenses of printing Appellee's brief, and reimbursement for reasonable attorney's fees be awarded to Vantage Press."

In *Lowe v. Willacy*, 239 F.2d 179, 180 (9th Cir. 1956), this Court awarded damages, attorneys' fees and double costs to an appellee who was compelled to participate in a frivolous appeal. In doing so, the Court stated:

"Since appellant by her own act has forced appellee to consider her brief and thereby necessarily to write his opposing brief, in affirming we adjudge to appellee just damages for his delay, 28 U.S.C. § 1912, of double his costs and an amount equal to the fee paid his attorney for his services in the appeal and the amount paid for the printing of his brief, the two latter amounts to be shown by appellee's affidavit filed with the Clerk of this Court."

On a similar note, the First Circuit stated in *Griffin Wellpoint Corp. v. Munro-Langstroth, Inc.*, 269 F.2d 64, 67-68 (1st Cir. 1959):

> "We think that this appeal is obviously frivolous and vexatious. Also, we do not like some of the tricks of advocacy indulged by counsel for appellant to lend apparent substance to its position. . . . For these reasons, pursuant to the discretion vested in us by 28 U.S.C. §1912, we shall award double costs to the appellee herein."

Other cases in which damages, attorneys' fees or costs have been awarded for frivolous appeals are legion. For example, see *Oscar Gruss & Son v. Lumbermen's Mutual Casualty Co.*, 422 F.2d 1278, 1284 (2d Cir. 1970); *Layton v. Selb Manufacturing Co.*, 359 F.2d 715, 717 (8th Cir. 1966), cert. denied 385 U.S. 929 (1966); *Dunscombe v. Sayle*, 340 F.2d 311 (5th Cir. 1965), cert. denied 382 U.S. 814 (1965); *A/S Krediit Pank v. Chase Manhattan Bank*, 303 F.2d 648, 649 (2d Cir. 1962); *Ginsberg v. Stern*, 295 F.2d 698 (3d Cir. 1961), cert. denied 368 U.S. 987 (1962); *Commercial Wholesalers, Inc. v. Investors Commercial Corp.*, 172 F.2d 800, 802 (9th Cir. 1949); *In re Midland United Co.*, 141 F.2d 692 (3d Cir. 1944); *Fern Gold Mining Co. v. Murphy*, 7 F.2d 613, 614 (9th Cir. 1925).

Appellee respectfully submits it is beyond dispute that this apeal is unsubstantial, unjustified, unnecessary and frivolous in the full meaning of these words. As was true in *Griffin Wellpoint Corp. v. Munro-Langstroth, Inc., supra*, only "tricks of advocacy indulged in by counsel for appellant lend any vestige of substance to this appeal." Appellant expressly waived

his right to appeal. Even if he had not expressly waived that right, his conduct in stipulating to a settlement under which he and his counsel accepted and retained substantial benefits and under which stipulation appellee suffered substantial detriment by waiving its right to appeal, clearly estops appellant from prosecuting this appeal.

We suggest, moreover, that the underlying cause of this improperly taken appeal in contravention of a binding stipulation cannot be attributed only to overzealous advocacy, but is motivated by the desire of plaintiff's counsel to invoke the provisions of Paragraph 13 of the Stipulation.*

Appellee seeks leave to submit at the appropriate time, by affidavit or testimony, evidence of the direct and indirect damage it has suffered by reason of this unwarranted appeal, which evidence, of course, will include such items as attorneys' fees and printing costs. See *Lowe v. Willacy*, 239 F.2d 179, 180 (9th Cir. 1956).

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*Paragraph 13 of the August 2, 1971, Stipulation of Settlement, approved by the November 15, 1971, Opinion and Order [XVII C.T. 5290], reads as follows:

> "13. Amfac and the above-named defendants and their counsel agree that the payment of the amount set forth in paragraph 12 hereof will not bar an application by plaintiff's counsel to the Court for an allowance of attorneys' fees, costs and out-of-pocket disbursements from any fund which might be created for the benefit of the plaintiffs and the classes they represent as the result of the original appraisals. Amfac and the above-named defendants and their counsel stipulate that they will make no objection to an application for such an allowance which does not exceed twenty percent (20%) of such fund." [XV CT 4804-4805].

IV.

CONCLUSION.

Amfac, Inc., is a public corporation whose stock is traded on the New York Stock Exchange and other leading exchanges. As such, it must comply with the rules and regulations of those exchanges and of the Securities and Exchange Commission which require it to disclose periodically to its shareholders, and to the Commission itself, the existence of pending litigation. The pendency of this appeal, therefore, even if it is frivolous and unwarranted, will have to be reported—resulting in undue unfavorable publicity which naturally prejudices the investment value of any security.

Appellee, Amfac, Inc., respectfully submits that there is no justification in law or in fact for this appeal, and that it should be dismissed forthwith as frivolous. Appellee also requests that it be awarded its direct and indirect damages, including attorneys' fees and double costs, incurred by reason of this appeal, and such sanctions as the Court may find to be warranted.

Respectfully submitted,

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SUPREME COURT, U. S.

IN THE

FEB 4 1974

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1973

No. 73-970

DERICKSEN M. BRINKERHOFF
and the MEMBERS OF THE CLASS,
Petitioners,

v.

AMFAC, INC.,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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A. Introduction

Petitioners do not seek review of the appraisers' valuation determination; in fact, they would concede that if the appraisals had been performed in the manner instructed, the values would have been final and binding. It is manifest, however, that in the case at bar, the appraisers completely disregarded the instructions and thus petitioners never received the appraisals for which they bargained in the settlement. And thus, as stated in the Petition, the issue here is whether it is not error for a court to approve an appraisal made contrary to and in violation of the detailed instructions to the appraisers, and whether the decision reached by the Ninth Circuit is not in direct conflict with the decision of the Court of Appeals for the District of Columbia, *Marceron v. Chevy Chase Services, Inc.*, 258 F.2d 155 (D.C. Cir. 1958).

Amfac's position that, in the settlement agreement, petitioners waived judicial review of whether the appraisers complied with the mandatory, jointly-drafted instructions was expressly rejected by the Ninth Circuit and is patently frivolous.[1] Surely, if instead of appraising the value of the assets of the three plantations involved in this action, the appraisers, through inadvertence, ignorance, negligence, fraud or otherwise, violated their instructions and appraised the value of the assets of three different plantations, even Amfac would agree that such appraisals could and should be set aside by the courts. The appraisers' failure herein to appraise the value of 92% of the land of one plantation and 50% of the land of another (Petition, p. 10 n.8) is no less prejudicial to petitioners. This is precisely the kind of question which Chief Justice Warren

1. See the *per curiam* Memorandum of the Ninth Circuit (in the Appendix ["App."] to the Petition, at pp. A1-A2) denying Amfac's motion to dismiss which was predicated exclusively upon the above contentions. The Ninth Circuit also denied Amfac's request to tax petitioners for the cost of the motion to dismiss because "the motion was not successful."

Burger, while sitting as a judge of the United States Court of Appeals for the District of Columbia Circuit, held to be subject to *de novo* review by a court of appeals, notwithstanding an agreement that the appraisers' value determinations would be final and binding. *Marceron v. Chevy Chase Services, Inc., supra.*[2]

B. This Case Raises Important Federal Questions Which Have a National Effect Upon Settlements of Federal Securities Class Actions.

Review by this Court of the case at bar is of exceptional importance to the overburdened federal judiciary, to the national corporate community, to the federal securities law bar and to the administration and enforcement of the federal securities laws because the manifest injustice created by the decisions below will preclude the avoidance of protracted and expensive jury trials of securities cases by means of the efficient, fair and economical settlement mechanism achieved herein.

All parties recognized that the value of the many thousands of acres of Hawaiian real estate owned by the plantations was, in the words of Amfac, the "ultimate principal issue" of the case. (Petition, p. 5.) Accordingly, after petitioners' motion for summary judgment on liability was granted finding Amfac guilty of securites law fraud, the parties agreed that, in lieu of separate jury trials on the issue of damages as to each of the three plantations herein, the value of the plantations' stock would be appraised by an independent investment banker, assisted by an independent *Hawaiian real estate* appraiser, *pursuant to mandatory written instructions* **jointly drafted** and agreed upon by the parties. The importance of the value of the real estate

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2. Amfac concedes at page 20 of its brief that the Ninth Circuit did not review *de novo* the appraisers' interpretation of their instructions as required by *Marceron*.

to the appraisal of the value of the plantations' stock was highlighted by the individualized attention which the parties gave in the instructions to the real estate and to the duties of the independent real estate appraiser (App., pp. A25-A27):

> "The settlement of this action provides that the value of the common stock of the Plantations shall be reappraised by an independent investment banker, who **in light of the substantial real estate holdings** and leaseholds of the Plantation companies, **shall** be assisted by an **independent real estate appraiser.**"
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> * * *
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> "Mr. Root, it is your duty, as the real estate appraiser, to **appraise the value** of such of the real estate of each of the three Plantations as directed by Eastman Dillon for Eastman Dillon's use in the consideration of net asset value. Although you are to perform your appraisal under the direction of Eastman Dillon, **you are to reach your own independent judgment as to the value of the real estate appraised** and you are to perform your appraisals in the ordinary, customary and usual manner recognized by your profession." (Boldface added.)

The investment banker was expressly instructed in mandatory language that, in appraising the value of the stock, he was required to rely upon the real estate values determined by the real estate appraiser (App., p. A26):

> "You shall consider all relevant value criteria which shall include but not necessarily be limited to market price, net asset value and investment value. In the consideration of net asset value you **shall** utilize the services of Gilbert W. Root, MAI, of Honolulu, Hawaii as *real estate appraiser* who, under your super-

> vision, **shall appraise the value** of such of the real estate of each of the three Plantations as is directed by you."[3] (Italics and boldface added.)

That the *jointly drafted* instructions were disregarded and that petitioners never received the appraisals for which they bargained cannot be denied. Despite the mandatory instruction to the real estate appraiser that "you are to reach your own independent judgment as to the value of the real estate appraised," Root admitted that he never appraised the value of any of the thousands of acres of land employed in sugar operations (Petition, p. 12), and this vital fact *has never been denied by Amfac*. Thus, even today, the value of the real estate employed in sugar operations, which Amfac itself characterized as the "ultimate principal issue" of the case, is unknown and unaccounted for. As District Judge Pence recognized (Petition, p. 13):

> "THE COURT: I'll state frankly, there is no one in the courtroom who knows what the 29,000 acres of Lihue would be worth. On all of the evidence before me, that's the only conclusion."[4]

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3. As set forth in the Petition (at pp. 8-9) and not denied by Amfac, "net asset value" as used in the settlement agreement and instructions was understood by all parties to mean "theoretical liquidation value." Also, Root was directed by Eastman Dillon to appraise *all* of the real estate of the three plantations. (Petition, p.8 n.6.)

4. Without denying that the appraisers failed to appraise the value of the real estate employed in sugar operations, Amfac now contends (at pp. 10-11) that the appraisers were required only to "consider" such value and were not required to "include" any element of such value in the appraised value of the plantations' stock. Even if Amfac were correct, the appraisers clearly could not have even "considered" the value of the real estate when that value was—indeed, still is—unknown. Significantly, however, although for obvious reasons it now seeks to reverse its position, Amfac conceded below that the value of the real estate must not only be "considered" by the appraisers, but must also be given *some*

An essential element of the settlement bargained for by the petitioners was the real estate appraisal function to be performed by Root, an MAI of Honolulu, Hawaii. Root admittedly abdicated that function and performed no real estate appraisal on any of the sugar lands, even though he admittedly "could have done so" (Petition, p. 12 n.11) and even though he was expressly instructed to do so. (Petition, pp. 7-8.) Despite the carefully drafted instructions, the petitioners received only a mathematical exercise in earnings multiples, based upon an earnings figure which the appraisers admitted was "pulled . . . out of the air." (Tr., December 4, 1972, at p. 182.) None of the elaborate procedure for instructing the appraisers would have been necessary if the parties or District Judge Tavares had intended such an unfair result.[5] That the appraisals would simply be an exercise for the calculation of an earnings multiple was unthinkable.

Thus, not one penny of credit was accorded by the appraisers for the thousands of valuable acres in sugar pro-

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weight, and that the Delaware cases so holding were controlling. (Rec., pp. 5802-04; Petition, p. 9.) *See, e.g., Poole v. N.V. Deli Maatschappij*, 243 A.2d 67 (Sup. Ct. Del. 1968); *Swanton v. State Guaranty Corp.*, 215 A.2d 242 (Del. Ch. Ct. 1965).

Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (Sup. Ct. Del. 1952), which is the sole case cited by Amfac (at pp. 11-12) and which was decided sixteen years prior to the Delaware Supreme Court's recent decision in *Poole v. N.V. Deli Maatschappij, supra*, is totally inapposite. The plaintiffs in *Mayflower* were complaining because the appraiser had performed no liquidation value appraisal of the assets of *Hilton*, the company which was acquiring Mayflower, not because he failed to appraise the liquidation value of the assets of *Mayflower* in which the plaintiffs held shares. In the context of the case at bar, this would be equivalent to petitioners complaining that the appraisers failed to value the assets of *Amfac*, which would be patently irrelevant since the settlement provided that market value of Amfac stock as of January, 1969 would prevail.

5. Although Judge Tavares had presided over all proceedings prior to the hearings on petitioners' motion to set aside the appraisals, Judge Pence replaced Judge Tavares, who was ill, for the hearing on petitioners' motion. See Petition, p. 11.

duction because *no real estate appraisal* was ever performed to determine the value of a single acre. The appraisers did not—and still do not—know the real estate appraisal value of the sugar lands, which was—and still is—the ultimate principal issue of the case.

The efficient and economical method of determining damages agreed upon by the parties herein is a model which could significantly reduce the time and resources which the federal courts and litigants must now expend on federal securities class action litigation. The settlement mechanism fashioned herein, utilizing mandatory, jointly drafted instructions to appraisers, could readily be adapted to the particular issues of any securities case, just as it was structured for resolution of the particular issues in this case. Its economy and efficiency are manifested not only by the elimination of jury trials, but by the avoidance of time-consuming and expensive discovery by the parties on the issue of damages which is required when a settlement embodies a compromise as to the amount of damages. See, e.g., *Percodani v. Riker-Maxson Corp.*, 50 F.R.D. 473 (S.D.N.Y. 1970). The settlement fashioned herein involved no compromise as to damages by any party, as Amfac recognizes (at p. 23).

Such settlements will only be considered, however, if the parties are assured that the instructions negotiated by them will be strictly enforced. Neither shareholders nor corporations can be expected to agree in the future to settlements providing for appraisals pursuant to jointly drafted instructions if courts permit appraisers, as did District Judge Pence in his reported decision, to disregard the instructions and to proceed as they, in their unfettered discretion, might choose.[6]

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6. The power given the appraisers to reject comments of the parties clearly did not include the power to ignore their instructions, as suggested by Amfac (at p. 20).

C. The Decision Of The Ninth Circuit Is In Conflict With The Decision Of The District Of Columbia Circuit.

Amfac concedes (at p. 20) that the Ninth Circuit did not review *de novo* the appraisers' interpretation of their instructions as contemplated by Judge (now Chief Justice) Burger in *Marceron v. Chevy Chase Services, Inc.*, 258 F.2d 155 (D.C. Cir. 1958).

However, Amfac attempts to distinguish away this clear conflict between the circuits on the grounds that: (1) in the instant case, the parties allegedly vested "final authority" in the appraisers and, therefore, the courts may not review whether the appraisers adhered to their mandatory instructions, and (2) review by the courts is a discretionary function.

Here, as in *Marceron*, the appraisers were appointed and were granted final and binding power "solely to appraise value," *not to interpret their instructions*. Judge Tavares instructed the appraisers:

> "The purpose of this hearing is to appoint Eastman Dillon, Union Securities & Co. and Gilbert W. Root, as officers of this Court to perform independent appraisals *of the value* of the capital stock of the Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. (which I shall hereinafter refer to as the 'Plantations') in accordance with the settlement of this action and to instruct the Court's appraisers as to the scope of their duties and the manner in which they **shall** perform them." (App., p. A25.) (Italics and bold face added.)
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> * * *
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> "Your duties are as follows:
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> "It is the duty of Eastman Dillon, as the investment banker, to appraise *the value of* a share of capital stock of each of the three Plantations as of January 1, 1969. . . ." (App., p. A26) (Italics added.)
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> * * *

> "Mr. Root, it is your duty, as the real estate appraiser, to appraise *the value of* such of the real estate of each of the three Plantations as directed by Eastman Dillon for Eastman Dillon's use in the consideration of net asset value." (App., p. A27.) (Italics added.)
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> * * *
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> ". . . Absent fraud, your final decision **as to the determination of the fair value** of a share of the capital stock of the Plantation companies will be final and binding upon the parties and non-appealable." (App., p. A27 (Boldface added.)

Thus, here as in *Marceron*, the appraisers' erroneous interpretation of their instructions is not binding upon the parties, but is a question "purely of law" subject to *de novo* judicial review.

Amfac's characterization of Chief Justice Burger's decision as rendering review by the trial and appellate courts discretionary is patently erroneous. In the language of *Marceron* (255 F.2d at 158):

> "[Appraisers] do not bind principals or contracting parties when they go beyond the authority delegated to them. When they exceed that authority their decision in the area of that departure is not binding; *their interpretation of their charter of authority, unlike the valuation, is subject to* [*de novo*] *judicial review.*" (Italics added.)

That review was not held discretionary in *Marceron* is manifested by the fact that Chief Justice Burger *reversed* the trial court without any discussion of whether the trial court had abused its discretion or committed clear or fundamental error.

Thus, it is clear that the refusal of the Ninth Circuit to review *de novo* whether the appraisers performed their appraisals in accordance with their instructions is in direct conflict with the decision of the District of Columbia Circuit in *Marceron*.

D. The Decisions Below Would Frustrate The Important Public Policy of Compelling Full Disgorgement.

As set forth in the Petition (at pp. 18-21), the decisions below would permit Amfac, a party found guilty of securities law fraud, to retain the multimillion dollar bounty of its fraud.

In a disingenuous attempt to minimize the extent of the illegal windfall it has reaped, Amfac makes the incredible argument (at pp. 12-13) that, since the minority shareholders of the plantations received Amfac stock for their plantation stock, "it is difficult to understand how, if Amfac received a windfall from the merger, petitioners would not have received a similar windfall."

Amfac's difficulty is obviously transparent. If the plantations' stock had not been grossly undervalued by excluding, *inter alia*, any credit for the extraordinarily valuable real estate employed in sugar operations, the minority shareholders would have received substantially more Amfac stock than they actually received as a result of the mergers. Moreover, Amfac's illegal windfall from acquiring the plantations at a fraction of their actual value is diluted among *all* Amfac shareholders,[7] not just the plantations' minority shareholders.

Thus, Amfac's contention (at p. 13) that "[i]f, in fact, Amfac received a bargain, petitioners received the same bargain and share *pro rata* in the benefits, since they now hold Amfac stock," is patently frivolous.

E. Petitioners Were Denied A Hearing On The Issue of Whether The Appraisals Were Tainted By Fraud.

Amfac asserts (at p. 15) that, at the hearing below on petitioners' motion to set aside the appraisals, petitioners

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7. As of January 1, 1969, Amfac had outstanding in excess of 4,250,000 shares of common stock whereas the minority shareholders of the Lihue and Puna plantations received less than 68,000 Amfac shares as a result of the mergers.

"submitted no evidence of fraud nor did they allege a single fact which, if true, would have tended to establish fraud." As set forth in the Petition (at pp. 13, 20), petitioners made a *prima facie* showing in their offer of proof that Amfac made numerous material representations to the appraisers which were flatly contradicted by Amfac's own documents and records. Yet, Judge Pence refused to allow petitioners to introduce into evidence any of the contradictory Amfac documents or to examine or depose Amfac officials to prove the fraudulent nature of its misrepresentations. If Amfac failed to disclose or misrepresented material facts which were relied upon by the appraisers, then the appraisals would be tainted by actual or constructive fraud and must be set aside.

Amfac's contention that petitioners conceded below that they could not show "venal" fraud is false and misleading. As the quotation at page 15 of Amfac's brief demonstrates, only the appraisers were exonerated of "venal" fraud, *not Amfac*.[8]

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8. Amfac omits the very next sentence wherein petitioners' counsel stated: "[The appraisers] have, on the other hand, been guilty of constructive fraud; constructive fraud in the nature as defined by the *Von Holt* [*v. Izumo Taisha Kyo Mission*, 42 Haw. 671 (1958)] case, which we discussed in our brief, and that does not imply nor is it intended to imply that that is the kind of fraud which involves any maliciousness or any immorality or any unlawful intent." (Tr., December 4, 1972, at p. 450.) Similarly, Amfac takes completely out of context the quoted excerpt at page 27 of its brief from the hearing of August 18, 1972. That hearing, held *before* the appraisers had submitted any report to the Court or the parties, was on petitioners' motions to enjoin another party from prosecuting, *in separate litigation in a different forum*, his charge that petitioners' counsel had entered into a conspiracy with the appraisers and with Amfac to defraud the minority shareholders by agreeing upon artificially low appraisals. (See Rec., pp. 5572-634.) Such charge against petitioners' counsel was obviously baseless, as was subsequently admitted in open court by the party who had made said charge. (Tr., December 6, 1972, at pp. 4-5.)

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 1974, three copies of this Reply Brief were served, by first class air mail, postage prepaid, on the attorneys for respondent Amfac, Inc. I further certify that all parties required to be served have been served.

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